No. 15-1373/16-0988

IN THE SUPREME COURT OF IOWA

TSB HOLDINGS, L.L.C. and 911 N. GOVERNOR, L.L.C.,
Plaintiffs-Appellants,

vs.

CITY OF IOWA CITY, IOWA,
Defendant-Appellee.

TSB HOLDINGS, L.L.C. and 911 N. GOVERNOR, L.L.C.,
Plaintiffs-Appellants/Cross-Appellees,

vs.

BOARD OF ADJUSTMENT FOR THE CITY OF IOWA CITY,
Defendant-Appellee/Cross-Appellant.

Review of Decision of Iowa Court of Appeals
Dated October 11, 2017

APPLICATION FOR FURTHER REVIEW

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals erroneously relied on this Court's recent decision in *Dakota, Minnesota & Eastern Railroad v. Iowa District Court*, 898 N.W.2d 127 (Iowa 2017) to deny Plaintiffs'/Appellants' ("TSB") claims for relief against Defendants/Appellees City of Iowa City, Iowa ("the City") and Iowa City Board of Adjustment ("the BOA") when neither the City nor BOA effectively pled a statute of limitations affirmative defense under Iowa Code Section 614.1(6).

II. Whether the Court of Appeals erroneously interpreted this Court's decision in *Kempf v. City of Iowa City, Iowa*, 402 N.W.2d 393 (Iowa 1987) and the Remand Order associated therewith, to deny TSB's claims for relief against the City and the BOA.

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STATEMENT SUPPORTING FURTHER REVIEW

The Court of Appeals interpreted this Court's recent decision in *Dakota, Minnesota & Eastern Railroad v. Iowa District Court*, 898 N.W.2d 127 (Iowa 2017) ("*Dakota*"), a ruling based on the statute of limitations applicable to judgments of courts of record found in Iowa Code Section 614.1(6) (2013), to bar TSB's claims based on *Kempf v. City of Iowa City*, 402 N.W.2d 393 (Iowa 1987) even though a statute of limitations defense was not pled. *See* Court of Appeals Ruling at 24, McDonald, J., concurring ("...*Dakota* dictates that the *Kempf* injunction expired under its own force after twenty years and TSB is thus not entitled to any relief under the injunction). In interpreting *Dakota*, the Court of Appeals held that *all* judgments "expire" of their own force after twenty years if not renewed. This reading of *Dakota* is contrary to the express language of Iowa Code Section 614.1(6) because it purports to limit the duration of judgments rather than causes of actions to enforce judgments. The Court of Appeal's interpretation of *Dakota* is not in accord with Iowa law regarding pleading affirmative defenses as it alleviates the need of a defendant to plead a statute of limitations defense and instead places the burden on a Plaintiff to prove that a cause of action is not time barred. If the Court of Appeals' reading of *Dakota* is correct, any relief

or right obtained through a court ruling, such as an easement or nonconforming use status, disappears after twenty years absent renewal. TSB does not believe this Court intended such results. The Court of Appeals therefore entered a decision in conflict with this Court regarding the effect of the statute of limitations under Iowa Code Section 614.1(6), decided an important question of law that has not been settled by this Court and rendered a decision which involves an important question of changing legal principles.

STATEMENT OF THE CASE

In *Kempf*, the property owners successfully challenged the downzoning of their property and obtained an injunction prohibiting the City from interfering with construction of apartment buildings thereon. The current consolidated cases (Appeal Nos. 15-1373 and 16-0988) involve TSB's appeals of the trial courts' and Court of Appeals' denial of TSB's requested relief against the City and the BOA.

In 2013 TSB, owner of the *Kempf* property, sought to construct apartment buildings on parts of the property as it believed *Kempf* permitted. In response the City downzoned the relevant parts of the property to prevent TSB's proposed construction. TSB sued the City (15-1373) to challenge the downzoning and the BOA (16-0988) for denying is site plan for construction of apartments TSB contended was permitted by *Kempf*. During TSB's appeals this Court decided *Dakota*.

On October 11, 2017 the Court of Appeals entered its ruling affirming the denial of TSB's requested relief in both 15-1373 and 16-0988 based extensively on *Dakota*. Since it relied exclusively on *Dakota* to dismiss the BOA action the Court of Appeals declined to address a number of appeal issues raised by TSB therein. This Application for Further Review followed.

BRIEF IN SUPPORT OF FURTHER REVIEW

I. Factual Background and Procedural History

These appeals find their genesis in *Kempf v. City of Iowa City*, 402 N.W.2d 393 (Iowa 1987). Wayne Kempf and his partners bought property in Iowa City in 1972. The property is six assembled and numbered lots, Lots 49-51 on the west and Lots 8-10 on the east (16-0988 App 216). At the time of its purchase the property was zoned R3B, a classification that permitted construction of apartment buildings. Kempf invested $114,500 to acquire the property and prepare it for development. Kempf intended to construct five apartment buildings and an office building on the property. After completion of the office building on Lots 8 and 9, Kempf began construction of a 29-unit apartment building on part of Lot 50. After neighbor complaints the City revoked Kempf's building permit and downzoned the property. After obtaining relief to complete the 29-unit building, trial proceeded on Kempf's claim that the downzoning constituted a taking of the undeveloped 2.12 acres of the property. This Court held:

> The overwhelming evidence discloses the lots in the remaining 2.12 acres of the Kempf tract cannot be improved with any development that would be economically feasible. For this reason, we find that application of the downzoning

> ordinance to the lots in the 2.12 acres would be unreasonable.
>
> ...We hold that [the 1978 zoning] may apply to the Kempf property, provided, however, that Kempf shall be permitted to proceed with development of apartment buildings, as shown by the record in this case, to the extent that such buildings conform to the ordinances in effect prior to the 1978 rezoning. The City shall be enjoined from prohibiting this use by Kempf. Further development or redevelopment of the property beyond that contemplated by Kempf as shown in this record and noted in this opinion, whether carried out by Kempf or future owners, will be subject to the amended ordinance above designated.

This Court remanded the case back to the district court "for a disposition in conformance with this opinion." *Kempf*, 402 N.W. 2d at 393-401.

On remand the trial court issued an order (the "Remand Order") which described the undeveloped 2.12 acres of the property and stated:

> The owner or owners of said properties, and their successors and assigns, shall be permitted to develop these properties [Lots 10, 49, 51 and part of Lot 50] with multiple dwellings (apartments) in accordance with the provisions applicable to the R3B zone in effect on May 30, 1978...
>
> ...The City is and shall be enjoined from interfering with development of these properties as herein provided.
>
> Once a use has been developed or established on any of the above-described properties, further development or redevelopment of that property shall be subject to the zoning ordinances in effect at the time such further development or redevelopment is undertaken.

The City did not challenge the language in the Remand Order and in fact approved it (Id. at 213-15).[1]

In 1989 and 1990 Kempf constructed a 12-unit building on part of Lot 50 and granted an electrical easement across parts of Lots 49, 50 and 10 for utilities thereto (16-0988 App. 424, 451). Other than the electrical easement and the 12-unit building on Lot 50, the parts of the property described in the Remand Order (Lots 10, 49 and 51) are unimproved since the issuance of the *Kempf* rulings.

Beginning in 2005 Kempf-related entities which owned the property entered a series of transactions in which they divested themselves thereof in parts.[2] In 2005, AB Investments (a Kempf entity) sold Lots 49-51 to Main Street Partners for $2,400,000. In 2009, TSB acquired Lots 49-51 for $3,400,000. In 2013, TSB acquired Lots 8-10 by purchasing 911 N. Governor LLC for between $220,000 and $240,000 (16-0988 App. 400-410).

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[1] *Kempf* and the Remand Order are collectively "the *Kempf* rulings" as appropriate.

[2] TSB notes these transactions as they were significant to the trial court in 16-0988.

The series of events giving rise to this litigation began in late 2012 when the City amended its comprehensive plan to downzone the property. Stated summarily, the City sought to downzone Lots 49 and part of Lot 50 from R3B, a classification that permitted additional apartment buildings, to RM20, a classification that allowed the existing buildings but no further construction thereof. The City sought to rezone Lots 8-10 to RS-8, a classification which prohibited apartment buildings (15-1373 App 12-22). In early January, 2013, prior to the downzoning, TSB submitted a site plan to construct a single apartment building on Lots 49-50 (16-0988 App. 399). A City zoning official evaluated the site plan as if the *Kempf* rulings applied (*Id*. at 305-307). Later in January TSB submitted a revised site plan showing apartment buildings on Lots 10, 49 and 51 along with the demolition of the existing office building on Lots 8 and 9 (*Id*. at 395, 422). This site plan was rejected by a city zoning official without any *Kempf* analysis as not complying with the proposed downzoning (*Id*. at 202). TSB filed two challenges to the downzoning which was effective March 28, 2013 (Ordinance 13-4518 as appropriate). The first action filed in February, 2013 (EQCV075292) sought declaratory relief to halt the downzoning. Subsequent to its passage TSB filed a Certiorari action (CVCV075457) challenging the

legality thereof and alleging it constituted a taking (15-1373 App. 134-138, 160-162). Both actions were based on the *Kempf* rulings. EQCV075292 and CVCV075457 were consolidated (the Zoning action/15-1373). TSB filed the required administrative appeal of the denial of its site plan to the BOA claiming that the *Kempf* rulings governed development of the property and not Ordinance 13-4518. The BOA affirmed the zoning official's ruling denying TSB's site plan based on the downzoning and stated it was without authority to determine whether the *Kempf* rulings applied to the property (16-0988 App. 392-394). TSB filed the BOA action claiming that it (the BOA) acted illegally in denying TSB's site plan. TSB also sought a declaratory judgment that the *Kempf* rulings, and not Ordinance 13-4518, governed development of the property (*Id*. 8-11)

Trial Court Proceedings in 15-1373. TSB and the City filed motions for summary judgment. TSB asserted that the downzoning violated the *Kempf* rulings' permitted construction of apartments and their injunctions prohibiting the City from interfering therewith. TSB contended that Ordinance 13-4518 constituted interference as a matter of law because TSB's site plan was undisputedly denied by the city zoning official and the BOA based solely thereon. The City asserted that

the downzoning was a legitimate exercise of its police power and that any illegality related to the failure to follow the *Kempf* rulings was a matter to be raised in the BOA action.[3] The City sought to dismiss TSB's takings claim for failing to meet notice pleading requirements. The trial court agreed with the City for its proffered reasons, granted the City's Motion and dismissed TSB's claims (15-1373 App. 170-182).

Trial Court Proceedings in 16-0988. TSB's claims against the BOA proceeded to trial. Three months prior thereto the BOA sought leave to amend its answer to raise four affirmative defenses (failure to state a claim, laches, res judicata and an unidentified statute of limitations). The trial court denied the BOA's motion and found that the amendment would substantially change the issues for trial with resulting prejudice to TSB (16-0988 App. 38-40). The trial court sustained TSB's Motion in Limine to prohibit introduction of any evidence related to unpled affirmative defenses at trial (*Id*. 56, 57).

A bench trial was held January 5 and 6, 2016 which involved presentation of evidence related to determining the meaning of the *Kempf* rulings. The legal issues were: 1) whether the right to construct

[3] In light of *Dakota* it is important to note that the City did not raise the statute of limitations related to judgments of record, Iowa Code Section 614.1(6), as a defense to TSB's *Kempf* claims.

apartments under *Kempf* was intended to be personal to Kempf notwithstanding the owners/successors/assigns language in the Remand Order; 2) whether TSB qualified as an "owner or owners, their successors and assigns;" 3) whether the type of "use" contemplated by the Remand Order had been "developed or established" on each relevant part of the 2.12 acres; 4) whether TSB's proposed site plan construction constituted "further development or redevelopment" subject to the Ordinance 13-4518; 5) whether the BOA acted illegally in failing to consider the *Kempf* rulings when evaluating TSB's site plan; and 6) whether TSB's claim for declaratory relief violated public policy as infringing on the City's power to rezone property. The trial court concluded that any right to build apartments under *Kempf* was personal to Kempf and the Remand Order's use of the terms "owner or owners, their successors or assigns" was inappropriate. The trial court held that TSB did not qualify as an owner, successor or assign based on extrinsic evidence related to the intent of intervening purchasers of the property who did not intend to build apartments and the fact that the property was sold in parts and not as a whole as owned by Kempf himself. The trial court held that Kempf established a "use" on the entire property by the way he "used" it since 1990 and by granting the 1990 electrical

easement. The trial court concluded that utilizing any part of the property differently than Kempf did as of 1990 would constitute, by definition, "further development or redevelopment" subject to current ordinances. The trial court agreed with the BOA's public policy defense (16-0988 App. 58-73). TSB filed a timely Motion to Enlarge to seek clarification related to the trial court's conclusion about the personal nature of *Kempf*, whether the right to build on the property was inherent in its ownership, whether it relied on any unpled affirmative defense in its conclusions and to clarify what *Kempf*-contemplated "use" had been "developed or established" on each relevant part of the property and as of when. TSB also asked the trial court to address its standing argument concerning the BOA's public policy defense and sought clarification of other matters (*Id*. 74-78). TSB's Motion was denied (*Id*. 79-82). TSB timely filed notices of appeal in 15-1373 and 16-0988 (15-1373 App. 336, 337, 16-0988 App. 83, 84).

TSB'S Appeals in 15-1373 and 16-0988. TSB's appeals were transferred to the Court of Appeals. TSB's appeal argument in 15-1373 was relatively simple. While acknowledging that the *Kempf* rulings contemplated the possible rezoning of the property, TSB asserted that it was nevertheless illegal to pass a zoning ordinance for the specific

purposes of stopping the very construction permitted by the *Kempf* rulings. The actions of both the city zoning official and the BOA proved, as a matter of law, that the downzoning had its intended effect of stopping construction of apartments. Citing *Boomhower v. Cerro Gordo Bd. of Adjustment*, 163 N.W.2d 75 (Iowa 1968), TSB asserted that since the BOA had no choice but to follow the city zoning the BOA action was not the proper forum to litigate *Kempf*-related issues. TSB also asserted its takings claim met notice pleading requirements.

In 16-0988 TSB contended that the rights granted under *Kempf* were not personal and the "owner or owners, their successors and assigns" language in the Remand Order was appropriate for a variety of reasons and even if not, the BOA could not challenge such language 28 years after the City attorney approved it. TSB contended it qualified as an "owner or owner, successors and assigns" under any reasonable construction of these terms. TSB contended that the trial court erroneously determined that a *Kempf*-contemplated "use" had been "developed or established" because there were literally no physical changes on Lots 49, 51 and 10 where TSB proposed to construct

apartments since prior to the *Kempf* rulings.[4] TSB contended that the BOA's unpled public policy defense violated the trial court's ruling on TSB's Motion in Limine and more significantly the BOA lacked standing to raise this defense for the City. The BOA cross appealed the trial court's denial of its Motion to Amend to raise the statute of limitations and, for the first time on appeal, identified Iowa Code Section 614.1(6) as applying in the BOA action.

After TSB's appeals were submitted this Court decided *Dakota*. *Dakota* involved an attempt to enforce an injunction stemming from a 1977 judgment through contempt proceedings. The *Dakota* defendant moved to dismiss and argued that any claims based on the 1977 judgment were time barred by Iowa Code Section 614.1(6), the statute of limitations related to judgments of record. The *Dakota* court stated that the 1977 judgment "expired under Iowa Code section 614.1(6)" and held that its enforcement was barred thereby. *Dakota*, 898 N.W.2d at 139. In light of *Dakota* the Court of Appeals requested the parties to brief the issue of whether the trial court's denial of the BOA's Motion to

[4] While TSB recognizes the granting of the electrical easement after *Kempf*, TSB contended that an easement is not the type of "use" contemplated by the *Kempf* rulings and therefore no such use had been developed or established by virtue of its granting.

Amend to raise Section 614.1(6) precluded application of *Dakota* to 16-0988 (but not 15-1373).

On October 11, 2017, the Court of Appeals ruled. The Court of Appeals analyzed *Dakota* and concluded, on its own motion, that *Dakota* was outcome dispositive of TSB's claims in both appeals. The Court of Appeals read *Dakota* not as a statute of limitations case but to mean that any judgment expires 20 years after its rendering absent renewal. The Court of Appeals reasoned that since TSB's claims were based on the *Kempf* rulings from 1987, TSB had to prove these rulings were still in force as an element of its claims; since the *Kempf* rulings expired in 2007 and TSB's claims were filed thereafter, under *Dakota* TSB could not do so. The Court of Appeals affirmed the trial court's ruling in the Zoning action (15-1373) based on its reading of *Dakota* and its belief that to permanently enjoin the City from rezoning the property was inappropriate. The Court of Appeals held that the dismissal of TSB's takings claim was improper and remanded 15-1373 for further proceedings related thereto. The Court of Appeals affirmed the result in the BOA action based solely on *Dakota* and therefore declined to reach the appeal issues related to the construction of the *Kempf* rulings or the

denial of the BOA's Motion to Amend. This Application for Further Review followed. Other facts appear as necessary.

II. Argument

A. The Court of Appeals erroneously relied on *Dakota* to deny TSB's claims for relief against the City and BOA.

Dakota held that a contempt action based on an injunction from a 1977 ruling, brought in 2013, was time-barred by Section 614.1(6). *Dakota,* 898 N.W.2d at 139. Based on issues appearing herein that were not before this Court in *Dakota*, TSB believes it is important to quote the relevant parts of the statute in their entirety. Iowa Code Section 614.1(6) provides:

> 614.1 Actions may be brought within the times herein limited, respectively, *after their causes of action accrue*, and not afterward, except when otherwise specifically declared:
>
> 614.1(6) Judgments of Courts of Record. Those founded on a judgment of a court of record, whether this or of any other of the United States, or of the Federal courts of the United States, within 20 years, except that a time period limitation shall not apply to an action to recover on a judgment for child support, spousal support or a judgment of distribution of marital assets....

(emphasis added). The Court of Appeals held that *Dakota* applied to TSB's appeals, the *Kempf* rulings "expired" in 2007, and that TSB cannot rely on an "expired" judgment to claim illegality of the City's rezoning of

the property. *See* Court of Appeals Ruling at 17. The Court of Appeals erred in its extension of *Dakota* for the following reasons: (1) the Court of Appeals read *Dakota* to limit the duration of judgments rather than causes of actions to enforce judgments, (2) the Court of Appeal's interpretation of *Dakota* is not in accord with Iowa law regarding pleading affirmative defenses, (3) the Court of Appeals interpretation of *Dakota* creates a litany of problems and uncertainty for Iowa property law matters, and (4) the Court of Appeals should not have applied *Dakota* retroactively to TSB's appeals.

1. **The Court of Appeals erred in reading *Dakota* to limit the duration of judgments rather than causes of actions to enforce judgments.**

The *Dakota* court did not specifically address the issue of when a cause of action accrues upon a judgment of record, nor did it address the question of whether the discovery rule applies to causes of action based on judgments of record. Section 614.1 provides "actions may be brought within the times herein limited, respectively, after their causes accrue." Iowa Code Section 614.1(6) does not regulate the "duration of judgments" but regulates only when "actions may be brought" to enforce a judgment. The statute does not provide that judgments "expire" after twenty years; it provides only that an "action" on a

judgment cannot be brought after twenty years. Other parts of Iowa Code pertaining to the limitation of actions show that if the legislature intended such a result it was aware of how to say so. *See* Iowa Code Section 614.1(7) (stating that no action shall be brought to set aside a judgment or decree quieting title to real estate unless the same be commenced within ten years *from and after the rendition thereof.* (emphasis added)).[5]

TSB contends the discovery rule applies to Iowa Code Section 614.1(6). Iowa Code Section 614.1 requires a cause of action to accrue.[6] A cause of action accrues or matures when a claimant sustains actual loss or resulting damage. *See Vossoughi v. Polashek*, 859 N.W.2d 643, 652 (Iowa 2015) (medical malpractice case describing when a cause of action accrues). Generally when the term "accrued" is used in a statute

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[5] See also, Judge McDonald's concurrence discussing Iowa Code § 615.1 (providing that certain judgments related to real estate shall be 'null and void' after two years). Court of Appeals Ruling at 25.

[6] "It may be true that a cause of action on a money judgment accrues on the date of judgment. It may also be true that a cause of action to enforce an injunction compelling affirmative action—i.e., the injunction at issue in *Dakota Railroad*—accrues on the date of judgment entry. However, it is not true that a cause of action on all judgments or injunctions accrues on the date of judgment entry." Court of Appeals Ruling at 26, McDonald, J., concurring.

of limitations the discovery rule applies. *Stoller Fisheries, Inc. v. American Title Ins. Co.*, 258 N.W.2d 336, 340 (Iowa 1977); *Vachon v. State*, 514 N.W.2d 442, 445 (Iowa 1994) (same). The injunction in *Kempf* restrained an interference with rights. TSB's injury did not occur until City passed Ordinance 13-4518 and the city zoning official/BOA used it to deny TSB's site plan. Assuming the *Kempf* rulings apply to TSB, TSB's claims accrued in 2013 and are not time barred if the discovery rule applies. The Court of Appeals application of *Dakota* does away with the concept of accrual and the discovery rule in holding that the judgment expires of its own force after twenty years. Such a reading of *Dakota* is contrary to the plain language of Section 614.1(6).[7]

2. The Court of Appeal's reading of *Dakota* is not in accord with Iowa law regarding pleading affirmative defenses.

The issue in *Dakota* involved the statute of limitations with respect to judgments of record. A statute of limitations defense must be raised by the party relying on the defense, which then has the burden of proving the claim is time barred. *See Carter v. Fleener*, No. 10-1970, 2011 WL 5867061, at *7 (Iowa App. 2011). If the defense is not pled it

[7] *See also*, Judge McDonald's concurrence citing an additional textual difficulty with *Dakota* related foreign judgments.

is waived. *See Id*. (quoting, *Cuthburtson v. Harry C. Harter Post No. 839 of the V.F.W.*, 65 N.W.2d 83, 87 (1954)). It is reversible error for the district court to raise the statute of limitations sua sponte. *See id*. (reversing judgment where the district court raised statute of limitations sua sponte).

The Court of Appeals application of *Dakota* to TSB's appeals is particularly egregious here. The City did not raise a statute of limitation defense in the Zoning Action. The BOA attempted to raise the statute of limitations defense in tardy fashion and was denied (16-0988 App. 38-40). Based on the trial court's ruling in the BOA action TSB was denied the opportunity to raise issues related to the applicability of the statute of limitations such as accrual, the discovery rule or equitable estoppel related to such a defense. As a consequence of the Court of Appeal's view of *Dakota*, it did not address the BOA's failure to timely plead or prove a statute of limitations defense and disposed of TSB's claims in both appeals essentially on its own motion. Insofar as *Dakota* alleviates the necessity of the BOA or the City to properly raise an affirmative defense under Chapter 614, *Dakota* is not in accord with Iowa law regarding pleading affirmative defenses.

3. If *Dakota* stands for the proposition that any right or remedy based on a court ruling expires 20 years after its rendering, *Dakota* creates a litany of problems and uncertainty under Iowa property law.

If rights and remedies other than monetary awards under a court judgment expire in 20 years if not renewed, Iowa property law has been changed. Rights in real property are frequently established by legal judgment. [8] Any judicially-determined nonconforming use loses such status after 20 years and may be zoned out of existence. *See*, *City of Jewell Junction v. Cunningham*, 439 N.W.2d 183 (1989). This would be true even though nonconforming use status is a property right running with the land when established by judgments. *City of Clear Lake v. Kramer*, No. 09-1689, 2010 WL 3157759 (Iowa Ct. App. 2010) (stating

[8] "For example, in *Murrane v. Clarke County*, 440 N.W.2d 613, 615 (Iowa Ct. App. 1989), this court affirmed a judgment establishing an easement by prescription. In *Maisel v. Gelhaus*, 416 N.W.2d 81, 89 (Iowa Ct. App. 1987), this court affirmed a permanent injunction barring certain landowners "from obstructing the natural flow of surface waters across their property." What is the status of these judgments after Dakota Railroad? Has the permanent injunction in *Maisel* expired of its own force? Is the restrained property owner now free to obstruct the natural flow of surface waters across their property to the detriment of the prevailing landowners? Under *Dakota*, it appears so." *See* Court of Appeals Ruling at 28, McDonald, J., concurring

that nonconforming use status runs with the land).[9] Under the Court of Appeal's reading of *Dakota*, litigants who establish easements or property boundaries by prescription, acquiescence or adverse possession in court proceedings lose such rights after 20 years unless renewed.

4. *Dakota* should not apply retroactively to TSB's appeals.

The Court of Appeals did not address the issue of whether *Dakota* should apply retroactively to TSB's appeals. Courts may hold, however, that a particular overruling decision should in fairness have only prospective application. *Beeck v. S.R. Smith Co.*, 359 N.W.2d 482, 484 (Iowa 1984). The test most frequently quoted was stated in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971):

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the

[9] TSB believes that the rights created by the *Kempf* rulings similarly run with the land.

> inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Matter of Estate of Weidman, 476 N.W.2d 357, 361–62 (Iowa 1991). If the Court of Appeals is correct, *Dakota* established a new principle of law whose resolution was not clearly foreshadowed in holding that under Section 614.1(6) any right or remedy based on a court ruling expires 20 years after its rendering. Moreover, given the prior history of Iowa Code Section 614.1(6), its purpose and effect, retroactive operation of *Dakota* will further frustrate the purpose of the statute as neither the City nor BOA effectively pled or proved a statute of limitations defense.

The *Dakota* court made a passing reference to "renewing" judgments and cited *Whitters v. Neal*, 603 N.W.2d 622 (Iowa 1999). According to *Whitters*, the only way to "renew" a judgment is to file a separate action pursuant to Iowa Code Section 614.3. If this is the process contemplated by *Dakota* to preserve rights and remedies other

than monetary obligations arising out of judgments, the practical difficulties are readily apparent.[10]

Substantial inequity would result to TSB if *Dakota* is dispositive of TSB's appeals. The trial court in the BOA action concluded, based on the facts and the law available to it at the time, that TSB would be prejudiced by allowing the BOA to raise defenses it had been aware of all along and whose presentation required consideration and resolution of factual and legal issues beyond those framed by the pleadings at the time. Without notice of the defense, TSB did not have the opportunity or reason to challenge its applicability.

[10] If two parties pursue an acquiescence case to judgment and no longer own their respective properties, the successor of the victor may never know that to preserve the results obtained in court he or she must file a separate action under Section 614.3. Moreover, Section 614.3 speaks in terms of the defendant to a judgment. If actions under Section 614.3 are necessary to "renew" rights to property arising through litigation, if the properties change ownership it is difficult to see how Section 614.3 applies.

B. The Court of Appeals erroneously interpreted the *Kempf* rulings to deny TSB's claims for relief against the City and the BOA.

1. Ordinance 13-4515 should be declared void in 15-1373 as a matter of law.

Assuming *Dakota* does not apply, TSB believes that the validity of Ordinance 13-4518 can be adjudicated on summary judgment. The *Kempf* rulings permit construction of apartment buildings on specific parts of the property and enjoin interference therewith. The Remand Order undisputedly applies to Lots 10, 49 and 51 (16-0988 App.38-40). Injunctions, when entered, are read broadly to fulfill their intent. *Bear v. Iowa Dist. Court, Tama Cnty*., 540 N.W.2d 439, 441 (Iowa 1995). The court that rendered the injunction may modify or vacate the injunction if, over time, there has been a substantial change in circumstances in the facts or law. *Id.* (citations omitted).

The purely legal question before the Court is whether the passing of Ordinance 13-4518, which was the undisputed reason for denial of TSB's site plans by both the city zoning official and its BOA, violates the right to construct apartments on the property and the injunction prohibiting the City from interfering with same. TSB contends it does. While the Remand Order does not specifically prohibit rezoning of the

property, it does prohibit interference with development. If injunctions are to be read broadly to fulfill their intent, *see Bear*, 540 N.W.2d at 441, the City's passing of Ordinance 13-4518 deprives TSB of any *Kempf* rulings' rights and should be declared a nullity.

The City argued, and the trial court agreed, that the passing of Ordinance 13-4518 was not the source of any alleged illegality. TSB suggests the cart appears to be ahead of the horse. The entire basis for denial of TSB's site plan by the city zoning official and the BOA was Ordinance 13-4518. In tort terms, Ordinance 13-4518 was the proximate cause of TSB's site plan denial. In fact, the City staff argued before the BOA that neither the zoning officer nor the BOA had the authority to consider anything other than the applicable zoning ordinance in evaluating TSB's site plan (15-1373 App. 64-66). A Board of Adjustment typically does not have authority to delve into property zoning issues. *See Boomhower v. Cerro Gordo Bd. of Adjustment*, 163 N.W.2d 75, 77 (Iowa 1968) (discussing the BOA's ability to consider zoning issues). It seems difficult to fathom that if an alleged illegality occurred, it was committed by a board (the BOA) that was without authority to address what allegedly caused it to act illegally (Ordinance 13-4518). It is equally difficult to fathom that the impact on the

property itself resulting from the passage of Ordinance 13-4518 (the denial of TSB's site plans) is irrelevant in determining whether Ordinance 13-4518 is legal. Yet this is the exact result of the trial court's and Court of Appeals' rulings. The above analysis demonstrates that the illegality stems not from the BOA's denial of TSB's site plan but from the passage of Ordinance 13-4518.

The City acted illegally in passing Ordinance 13-4815. *See Bontrager Auto Serv. v. Iowa City Bd. of Adjustment*, 748 N.W.2d 483, 491 (Iowa 2008) (defining illegality for certiorari purposes). Actions taken in violation of an injunction are void. *See Northwestern Mut. Life Ass'n v. Hahn*, 713 N.W.2d 709, 712 (Iowa App. 2006) (holding that change in beneficiary designation form made in violation of temporary injunction should be set aside). The City's passing of Ordinance 13-4518 was illegal as a matter of law, and the trial court erred in granting the City's Motion for Summary Judgment and denying that of TSB.

2. The Trial Court in 16-0988 Erred in its Construction of the Kempf Rulings and in denying TSB's Requested Relief.

The Court of Appeals dismissed the BOA action solely based on its reading of *Dakota* and therefore declined to address TSB's appeal arguments related to the construction of the *Kempf* rulings, the BOA's

public policy defense and its cross appeal regarding the statute of limitations defense. *See* Court of Appeals' Ruling at 20. Although thoroughly briefed previously, TSB is required to repeat its arguments and attempts to do so summarily.

a. The right to construct apartments was not personal to Kempf.

The trial court's construction of the Remand Order was colored by its view that the right to build apartments was personal to Kempf himself. The trial court viewed the Remand Order's use of the terms "owner or owners, their successors and assigns" as inappropriate.[11] This view appears to stem from the use of the word "Kempf" in the singular which TSB concedes, *see Kempf*, 402 N.W.2d at 401 ("Kempf shall be permitted to proceed with development of apartment buildings... the City shall be enjoined from prohibiting this use by Kempf") and its belief that *Kempf* was decided on the basis of allowing only Kempf to realize his investment-backed expectations because of his personal investment in preparing the property for development (vested rights analysis) (*Id*. at 68, 69). TSB disagrees. While Kempf is

[11] The trial court stated: "Kempf fulfilled his plans and any special rights that existed under the rulings ceased before he sold the properties (16-0988 App. 70). This view makes the Remand Order pointless.

mentioned in the singular, more importantly, the basis for *Kempf* was the devaluing impact of the ordinance regardless of Kempf's personal expenditures. *Kempf*, 402 N.W.2d at 400. *See Pazzolo v. Rhode Island*, 533 U.S. 606 (2001) (discussing regulatory takings and the transfer of rights with property). *Kempf* is not a vested rights case.

The best evidence that the right to build apartments was not personal to Kempf is the Remand Order itself. The circumstances under which a decree was issued are relevant to show its meaning. *US Bank Nat. Assn, NA v. Allen*, No-03-0592, 2003 WL 23008290 (Iowa App. 2003). Presumably, 30 years ago when the Remand Order was entered, those involved were familiar with the facts and had read *Kempf*. No party to *Kempf* believed the right to construct apartments was personal. The City attorney approved its language (16-0988 App. 215). The City also kept a zoning map showing R3B zoning on the parts of the property subject to the Remand Order (*Id*. at 116-118 (zoning administrator testimony)). *See In Re Robert's Estate*, 134 N.W.2d 458, 461 (Iowa 1964) (stating that the failure to appeal or ask for modification of a decree raises a presumption that its terms are satisfactory). If any party was dissatisfied with the Remand Order, the remedy was an appeal or certiorari action to challenge its terms within 30 days after its issuance.

See City of Okoboji v. Iowa District Ct., Dickinson Cty., 744 N.W.2d 327, 330 (Iowa 2008) (discussing remedies when remand orders do not implement appellate court mandate).[12]

b. TSB qualifies as an "owner or owners, their successors and assigns" under the Remand Order

The trial court's view of the personal nature of Kempf led it to construe the relevant terms of the Remand Order contrary to the ordinary meanings thereof. Court rulings are construed and interpreted like any other written instrument. *Dairyland, Inc. v. Jenison*, 207 N.W.2d 753, 754 (Iowa 1973). Words are given their plain meaning. *Tom Riley Law Firm v. Tang*, 521 N.W.2d 758, 759 (Iowa 1994) (contract case). Without specifically addressing the terms "owners" or "assigns," the trial court, relying on *Sun Valley Lake Ass'n v. Anderson*, 551 N.W.2d 621 (1996) (determining the meaning of "successor developer" in the

[12] Citing *In Re Marriage of Davis*, 608 N.W.2d 766, 769 (Iowa 2000), the concurrence claimed it was required to treat the offending Remand Order language as null and void. *See* Court of Appeals' Ruling at 31 (McDonald, J. concurring). Assuming the Remand Order is inconsistent with *Kempf*, the remedy is not a collateral attack thereon 30 years after its issuance. *See In Re Estate of Folek*, 672 N.W.2d 785, 790 (Iowa 2003) (discussing collateral attacks on judgments). The remedy, as was apparently done in *Davis*, is a timely direct appeal or certiorari action related to the offending remand order.

context of restrictive covenants) concluded that TSB was not a "successor" to any right to construct apartments because: 1) Kempf fulfilled his plans; 2) an intervening purchaser bought part of the property without the intent of building apartments; and 3) the property was not sold as one tract as Kempf purchased it (16-0988 App 68-70). Such a construction is not consistent with the ordinary meaning of such terms. *See Reichard v. Chicago B & Q R. Co.*, 1 N.W.2d 721, 732 (discussing the terms "assigns"). If the trial court is correct, the meaning of a term can change at some unknown time at the unknown whim of a subsequent purchaser. The meaning of a term cannot change based on how property is sold. Such a construction is at odds with the Remand Order's specific identification of parts of the property subject to its terms. Under any reasonable construction of the terms "owner, owners their successors and assigns" TSB qualifies as such and the trial court erred in concluding otherwise.

c. The trial court erred in its conclusions about the existence of a developed or established use and further development/redevelopment.

The trial court concluded that a "use" had been developed or established on the property based on essentially how Kempf himself "used" the property in its entirety since 1990 and the sale of it in parts

(16-0988 App 70). The trial court concluded, therefore, that to do anything different on any part of the property from how Kempf "used" it as of 1990 automatically constituted "further development or redevelopment" subject to current ordinances (*Id*.). TSB suggests this interpretation is erroneous. There is a difference between how property is "used" and a *Kempf*-contemplated use. The undisputed evidence shows that the lots where TSB proposed to construct buildings, Lots 10, 49 and 51, are in exactly the same state (other than an easement for an electrical line on Lots 49, 50 and 10) as they were when *Kempf* was decided (*Id*. at 125-128, 411-420). TSB suggests that the Remand Order is meaningless if a use has been "developed or established" when there are no structures on the parts of the property at issue since the rendering of the *Kempf* rulings . Further, if there exists no developed or established use on the relevant parts of the property, there is no need to determine whether TSB's proposed construction constitutes further development or redevelopment.

The gist of the trial court's ruling is that any "use" different from how Kempf himself "used" any part the property as of 1990, as a whole, must comply with current zoning. This view is contrary to the *Kempf* rulings' carving out 2.12 acres thereof for construction of apartment

buildings. TSB's request to identify what "uses" were developed or established on the relevant parts of the property and when were unanswered by the trial court. The trial court erred in concluding that a use had been developed or established on the relevant parts of the property and that any additional construction on any part thereof must comply with current zoning.

d. The trial court erred in sustaining the BOA's public policy defense.

The trial court concluded that TSB's proposal to develop the property per the *Kempf* rulings violates public policy as infringing on the City's right to zone (16-0988 App. 71). Assuming this unpled affirmative defense subject to TSB's Motion in Limine is properly considered, the defense still fails. The BOA cannot raise public policy arguments on behalf of the City because it lacks standing to do so. Standing requires a party to demonstrate a specific personal or legal interest in the litigation and resulting injury from the outcome. *Alons v. Iowa District Court, Woodbury County*, 698 N.W.2d 858, 864 (Iowa 2005). The BOA fails this test. It is a quasi-judicial independent body. Zoning is a legislative function and a Board of Adjustment has no role in determining the propriety thereof. *Boomhower*, 163 N.W. 2d at 77. As

an independent quasi-judicial body it cannot have the "personal or legal interest" in the outcome TSB's litigation and cannot show any resulting harm therefrom. The BOA has not cited any authority for the proposition that developing property as allowed by a court ruling violates any stated public policy. The trial court erred in sustaining the BOA's public policy defense.

e. The BOA acted illegally in denying TSB's site plan without considering the *Kempf* rulings.

TSB's request for Certiorari relief stands or falls with the vitality of the *Kempf* rulings. TSB asserts that the BOA acted illegally in ignoring their mandates when evaluating TSB's site plan. The trial court erred in annulling TSB's Petition for Writ of Certiorari. TSB asks this Court to do what the Court of Appeals refused to do by relying on *Dakota*, which is to define the parameters of the *Kempf* rulings, sustain TSB's Petition for Writ of Certiorari and modify the BOA's ruling to require it to analyze TSB's site plans under the *Kempf* rulings as interpreted by this Court. *See* Iowa Code Section 414.18 ("...the Court may reverse or affirm, wholly or partly, or may modify the decision brought up for review...").

III. SUMMARY

The Court of Appeals' ruling necessitates that this Court clarify *Dakota's* meaning. TSB believes *Dakota* to be a statute of limitations case but the Court of Appeals reads it to be much more. If the Court of Appeals is correct, statutes of limitations no longer regulate when causes of action may be brought but rather limit their duration. The Court of Appeals Reading of *Dakota* creates significant problems and uncertainty under Iowa law regarding the status of certain judgments.

Substantial inequity would result to TSB if *Dakota* is dispositive of TSB's appeals. Prior to 2013, the actions of all parties involved indicated that *Kempf* governed development of the property. As noted by the Court of Appeals, TSB purchased the property with the intent of developing apartments and was told by both the seller and the City in 2009, and again by the zoning official in 2013, that the *Kempf* still governed development of the property. *See* Court of Appeals Ruling at 7; 16-0988 App. 116-118 (administrator testimony of R3B zoning map).

The City never raised a statute of limitations defense and the BOA was precluded from doing so based on a tardy filing. During TSB's appeals, *Dakota* was decided and the Court of Appeals requested briefing in 16-0988 on whether the trial court's denial of the BOA's

attempt to raise the statute of limitations defense precluded application of *Dakota*. In the ultimate irony, the Court of Appeals determined that based on its view of *Dakota*, a statute of limitations case, there is no need to determine whether the BOA was wrongly denied the opportunity to raise a statute of limitations defense.

It is clear from the concurring opinions that the Court of Appeals had significant reservations about applying *Dakota* to the cases at hand but felt compelled to do so. TSB asks this Court to grant further review, determine whether *Dakota* is outcome-dispositive of TSB's appeals and, if not, make the determinations that the Court of Appeals unfortunately declined to make as discussed above concerning the meaning of the *Kempf* rulings, the viability of the BOA's public policy defense and pass on whether the trial court abused its discretion in denying the BOA's Motion to Amend to raise its statute of limitations defense.

As a final point, the City and the trial court in 13-1373 should not be able to argue that any alleged illegality in the failure to follow *Kempf* stems from the BOA and then have the Court hold that the BOA never had the statutory authority to consider the *Kempf* rulings. Yet this is the result of the combined holdings in these consolidated appeals. TSB requests that this Court determine Ordinance 13-4518 was the source

of the alleged illegality or determine that the BOA should evaluate TSB's site plan as if the Kempf rulings governed the property's development.

VI. CONCLUSION

TSB respectfully requests that this Court grant further review herein and provide the relief requested above.

REQUEST FOR ORAL ARGUMENT

Notice is hereby given that Plaintiff/Appellant requests oral argument of this matter.

Respectfully submitted,

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ATTORNEY'S COST CERTIFICATE

I certify that the actual cost of reproducing the necessary copies of Plaintiff-Appellant's Application for Further Review consisting of pages was in the sum of $0.00.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This application complies with the type-volume limitation of Iowa R. App. P. 6.1103(4) as supplemented by an order of Court dated October 25, 2017 because this brief contains 7,592 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.1103(4).

2. This application complies with the typeface requirements of Iowa. R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 Font Cambria.

Dated this 31st day of October, 2017.

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PROOF OF SERVICE AND CERTIFICATE OF FILING

I, Charles A. Meardon, certify that on October 31st, 2017, I served this document by filing an electronic copy of this document with the Electronic Document Management System to all registered filers for this case. A review of the filers in this matter indicates that all necessary parties have been and will be served in full compliance with the provisions of the Rules of Appellate Procedure.

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IOWA COURT OF APPEALS DECISION, OCTOBER 11, 2017

IN THE COURT OF APPEALS OF IOWA

No. 15-1373 / 16-0988
Filed October 11, 2017

TSB HOLDINGS, L.L.C. and 911 N. GOVERNOR, L.L.C.,
Plaintiffs-Appellants,

vs.

CITY OF IOWA CITY, IOWA,
Defendant-Appellee.

TSB HOLDINGS, L.L.C. and 911 N. GOVERNOR, L.L.C.,
Plaintiffs-Appellants/Cross-Appellees,

vs.

BOARD OF ADJUSTMENT FOR THE CITY OF IOWA CITY,
Defendant-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Johnson County, Chad A. Kepros (trial) and Mitchell Turner (motion to amend answer and summary judgment), Judges.

A property owner appeals the district court's grant of summary judgment to the City of Iowa City and the district court's decision in favor of the Board of Adjustment for the City of Iowa City, and the Board of Adjustment appeals the district court's denial of its motion to amend its answer to add affirmative defenses. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Charles A. Meardon of Meardon, Sueppel & Downer, P.L.C., Iowa City, and James W. Affeldt of Elderkin & Pirnie, P.L.C., Cedar Rapids, for appellants/cross-appellees.

Elizabeth J. Craig and Sara Greenwood Hektoen, Assistant City Attorneys, Iowa City, for appellees/cross-appellant.

Heard by Doyle, P.J., McDonald, J., and Blane, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2017).

BLANE, Senior Judge.

TSB Holdings L.L.C. and 911 N. Governor, L.L.C. (TSB) appeal the district court's rulings granting the City of Iowa City's motion for summary judgment and denying TSB's rule 1.904(2) motion. TSB also appeals the district court's decision in a separate case in favor of the Board of Adjustment for the City of Iowa City (BOA). At issue in these cases is the City's decision to rezone certain properties owned by TSB and the BOA's decision to deny TSB's site plans for those properties based on the City's rezoning, which TSB contends interfered with its ability to develop the properties and violated the supreme court's decision in *Kempf v. City of Iowa City*, 402 N.W.2d 393, 401 (Iowa 1987).

In its case against the City, TSB claims the court erred in granting the City's motion for summary judgment, and in denying its motion, because the City's rezoning ordinance violates the district court's 1987 remand order that was entered following the *Kempf* decision. TSB also claims the court erred in concluding in the 1.904(2) ruling that TSB failed to meet the notice pleading requirements for its takings claim.

In its case against the BOA, TSB claims (1) the district court erred in concluding it is not a successor or assign to the properties owned by Kempf, (2) the district court erred in concluding the properties had already been developed through Kempf's inaction and concluding TSB's plans called for the further development or redevelopment of the properties, (3) the district court erred in concluding TSB's actions violate public policy, and (4) the BOA acted illegally in not applying the *Kempf* decision and remand order to its site plans. In a cross-appeal, the BOA claims the district court abused its discretion in denying its

motion to amend its answer to add certain affirmative defenses, specifically the statute of limitations.

With respect to the litigation against the City, we agree the district court correctly granted summary judgment to the City; however, we reverse and remand the district court's order that dismissed TSB's takings claims based on notice pleading. With respect to the BOA litigation, we affirm the district court's decision that the BOA did not act illegally in failing to apply the *Kempf* decision and the remand order to TSB's site plans in light of the supreme court's recent ruling in *Dakota, Minnesota, & Eastern Railroad v. Iowa District Court* (*Dakota Railroad*), 898 N.W.2d 127, 138 (Iowa 2017). In light of this holding, we need not address the BOA's cross-appeal regarding its motion to amend its answer to add affirmative defenses.

I. Background Facts and Proceedings.

The properties at issue in this matter have a long and storied history in our courts. As detailed in the *Kempf* decision, the properties, located in Iowa City, were acquired by Wayne Kempf and others in 1972 in reliance on the City's 1968 study that proposed the properties be used for medium to high density housing. 402 N.W.2d at 395–96. Kempf started developing the site to construct five apartment buildings and a commercial office building, and invested a total of $114,500 in the land purchase price and preliminary site development. *Id.* After Kempf began construction on a twenty-nine-unit apartment building, several neighboring property owners objected, and the City revoked the previously issued building permit. *Id.* at 396–97. Litigation ensued, which forced the City to reissue permits for the apartment building, and the construction on that building

was completed in 1977. *Id.* at 397. The City imposed a moratorium on further development on the properties and also rezoned the properties in 1978 to prevent further apartment building development. *Id.* at 398. The litigation between the parties culminated in the supreme court's ruling in 1987, which held:

> The record discloses admissible testimony the downzoning of the tract in question would not contribute to public health, safety, or welfare. The open invitation the city extended in "The North Side Study" to proceed with such developments carries with it the plain conclusion there would be no adverse impact on city streets or utilities, nor does the city argue otherwise. The large investment Kempf made in filling, grading, and bringing in utilities for the whole tract in reliance on the zoning and the city's study would provide substantial support for application of the vested rights principle.
>
> Under this record, however, we are not required to develop that analysis because a more limited test controls our determination. The overwhelming evidence discloses the lots in the remaining 2.12 acres of the Kempf tract cannot be improved with any development that would be economically feasible. For this reason we find that application of the downzoning ordinance to the lots in the 2.12 acres would be unreasonable.
>
> The relevant principle is found in McQuillin:
>
> > Where it appears that under existing zoning restrictions property must remain for an unpredictable future period unimproved, unproductive, and a source of expense to the owners from heavy taxes, the zoning ordinance is unreasonable as to such property.
>
> 8 McQuillin, *Municipal Corporations* § 25.45, at 122 [(3d ed. 1982)]. Undergirding this rule is the concept that in these situations there is, in effect, an unconstitutional taking. Although a property owner does not necessarily have a remedy if the police regulation merely deprives the owner of the most beneficial use of his or her property, frustration of investment-backed expectations may amount to a taking. . . .
>
> We agree with the trial court that application of the June 28, 1978 zoning ordinance to Kempf's underdeveloped lots and portions of lots would be unreasonable and therefore invalid. We are left with the question of the present and future status of these lots and portions of lots.
>
> . . . .
>
> . . . [W]e hold that [the zoning ordinances at issue] may apply to the Kempf property, provided, however, that Kempf shall be permitted to proceed with the development of apartment

> buildings, as shown by the record in this case, to the extent that such buildings conform to the ordinances in effect prior to the 1978 rezoning . . . . The city shall be enjoined from prohibiting this use of the property by Kempf. Further development or redevelopment of the property beyond that contemplated by Kempf as shown by this record and noted in this opinion, whether carried out by Kempf or future owners, will be subject to the amended ordinances above designated.

Id. at 400–01 (citations omitted).

The matter was remanded to the district court "for a disposition in conformance with this opinion." *Id.* at 401. On remand, the district court issued a supplementary order that outlined the legal description of the 2.12-acre undeveloped portion of Kempf's land and then provided:

> The owner or owners of said properties, and their successors and assigns, shall be permitted to develop those properties with multiple dwellings (apartments) in accordance with the provisions applicable to the R3B zone in effect on May 30, 1978, prior to the rezoning of said real estate which was finalized on June 28, 1978.
>
> . . . The City is and shall be enjoined from interfering with development of those properties as herein provided.
>
> Once a use has been developed or established on any of the above-described properties, further development or redevelopment of that property shall be subject to the zoning ordinances in effect at the time such further development or redevelopment is undertaken.

The language used in the remand order was approved by the attorneys for the parties and the City has never challenged that language.

Following the remand, Kempf applied for and received a building permit to construct a twelve-unit apartment building in 1988–89. In addition, in 1990, Kempf granted the local energy company an electrical easement across a portion of the undeveloped land to provide utilities to the new apartment building. No other development occurred on the properties.

In 2005, the company associated with Kempf and his partners sold a portion of the 2.12 acres of the land at issue in *Kempf* and the land occupied by the two existing apartment buildings to Main Street Partners for $2.4 million. Then in 2009, the properties were sold to TSB for $3.4 million. Tracy Barkalow, owner of TSB, testified he acquired the properties for the existing apartments and to add more apartments per the *Kempf* order as the sellers provided him a copy of the *Kempf* rulings and a 1988 site plan created by Kempf that detailed more apartment buildings on the land. In addition, Barkalow testified his appraiser communicated with the City before the purchase and confirmed the pre-1978 zoning would apply to the properties to construct additional apartments on land under the *Kempf* ruling.

In 2011, the City received and denied a request from a developer to rezone the portion of the land occupied by the commercial building and a small portion of the 2.12 acres at issue in *Kempf*, and the City then reexamined the zoning of all the properties in question. City staff recommended rezoning the properties to prevent high density residential development. In March 2012, the portion of the land occupied by the commercial building was sold by the company associated with Kempf and his partners to 911 North Governor L.L.C. for $200,000.

In January 2013, TSB submitted its first site plan to develop the properties with apartment buildings. That plan was routed to the various City building departments and evaluated under the *Kempf* ruling. However, the plan was ultimately rejected on January 17, 2013.

In light of the new rezoning proposal for the properties, the City put a moratorium into effect on January 22, 2013, to prevent the approval of any site plan. Undeterred, TSB submitted additional site plans in January, which included all properties and provided for the construction of three additional apartment buildings and demolition of the current commercial office building. The City denied the site plans as not complying with the proposed new zoning designation without an evaluation of the application of the *Kempf* ruling.

The City exercised its statutory authority to engage in municipal zoning.[1] As relevant here, in November 2012, the City amended its comprehensive zoning plan. On March 19, 2013, the City adopted an ordinance to bring the properties at issue "into compliance with the City's Comprehensive Plan." Iowa City, Iowa, Ordinance No. 13-4518 (2013). The ordinance rezoned the properties at issue from mutli-family (R3B) and commercial office (CO-1) to high-density single family residential (RS-12) and medium-density multi-family residential (RM-20). The ordinance, in relevant part, provides as follows:

> Whereas, the City of Iowa City has initiated a rezoning of property located of 906 North Dodge Street from Multi-family (R3B) to High-Density Single-Family Residential (RS-12); property located at 911 North Governor Street from Commercial Office (CO-1) to High-Density Single-Family Residential (RS-12); property located at 902 and 906 North Dodge Street from Multi-family (R3B) to

[1] Chapter 414 of the Iowa Code empowers cities to engage in zoning for "the purpose of promoting the health, safety, morals, or the general welfare of the community." Iowa Code § 414.1 (2013). To avail itself of the zoning powers conferred by chapter 414, a municipality is required to appoint a "zoning commission," which shall "recommend the boundaries of the various original districts and appropriate regulations and restrictions to be enforced therein." *Id.* § 414.6. Once a zoning commission has been established, the power to regulate land use must be done "in accordance with a comprehensive plan." *Id.* § 414.3. The regulations and restrictions adopted "shall be uniform for each class or kind of buildings throughout each district." *Id.* § 414.2. Any "regulation, restriction, or boundary shall not become effective until after a public hearing at which parties in interest and citizens shall have an opportunity to be heard." *Id.* § 414.4.

> Medium-Density Multi-Family Residential (RM-20) in order to bring the properties into compliance with the City's Comprehensive Plan; and
>
> Whereas, City plans and policies, including the Comprehensive and Strategic Plan, have changed considerably in the last 40 years, with the current Comprehensive Plan and Historic Preservation Plan containing policies to encourage preservation of the single family character of the City's older single family neighborhoods and policies that serve to stabilize these neighborhoods by encouraging a healthier balance of rental and owner-occupied housing rather than redevelopment for housing that serves primarily short-term residents; and
>
> Whereas, the Central District Plan indicates that R3B zoning is obsolete and the properties with this designation should be rezoned to a valid zoning designation;
>
> . . . .
>
> Whereas, the Comprehensive Plan policies in place during the 1960s that led to the R3B zoning on Dodge Street encouraged demolition and redevelopment of older neighborhoods at higher densities; and
>
> Whereas, the City's Zoning Code no longer includes the R3B zoning designation due to its inconsistency with the City's current comprehensive planning goals and polices; . . . .
>
> . . . .
>
> NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF IOWA CITY, IOWA:
>
> SECTION I APPROVAL. Property described below is hereby reclassified . . . .

Id. The effect of the ordinance on TSB was to allow the existing buildings to remain but prevent any further apartment building construction on the land.

TSB filed two separate challenges in response to the City rezoning the properties. In February 2013, prior to the passage of the ordinance, TSB filed a declaratory judgment action seeking prospective relief. This was docketed as No. EQCV075292. In Count I of its action, TSB requested

> a declaratory decree adjudging the Defendant may not alter the zoning of the property, and that if the Defendant does so, that the altered regulation is, to the extent it applies to the property, unconstitutional and void; that the Court enter a temporary injunction restraining Defendant from altering the zoning of the

> property until a hearing has been held; for such other relief as the Court deems just and equitable; and the costs of this action.

Count II of the petition sought a temporary injunction restraining the City from "altering the zoning of the property." In April 2013, TSB timely filed a petition for writ of certiorari challenging the rezoning ordinance. The petition was docketed as No. CVCV075457. It alleged:

> The change in the zoning classification was improper, unreasonable, arbitrary and capricious, illegal, contrary to prior rulings of the Supreme Court of Iowa and of the Johnson County District Court, *and would result in an unconstitutional taking of Plaintiff's property*.

(Emphasis added.) In the prayer for relief, TSB requested a writ be issued and that the Defendant's "rezoning of the property be annulled and declared void." The district court consolidated the cases.

The City denied the petitions, and both parties filed motions for summary judgment. The motions came on for a hearing on March 20, 2015, and the court issued its ruling on June 3, 2015. The ruling granted the City's motion on all claims pled by TSB and denied TSB's summary judgment motion. TSB filed a rule 1.904(2) motion seeking clarification as to whether the district court's decision also dismissed its takings claim against the City. The City resisted the 1.904(2) motion, asserting TSB did not adequately plead a takings cause of action. The court enlarged its summary judgment ruling to find:

> [TSB] did not meet notice pleading requirements for their purported takings claim. [TSB] made a mere mention of an unconstitutional taking in [its] petition and did not clearly state any separate takings claim or claim for damages. It was the Court's intent, in issuing the June 3, 2015 ruling, that all of [TSB's] claims—[TSB's] entire case—in EQCV075292 and CVCV075457 would be disposed of by the ruling.

Meanwhile, after the rezoning, TSB again submitted site plans to develop the 2.12-acre lot with additional apartment buildings, but the site plans were denied by the City's regulation specialist, and although the appeal was not timely filed, the BOA agreed to hear the appeal. On appeal the BOA denied TSB's site plans. The grounds for denying relief were as follows:

> The Regulations Specialist is subject to the legislative actions of City Council, including the moratorium and rezoning of the subject properties.
>
> The Regulation Specialist reviewed the site plans based on the RS-12 zoning as required by the moratorium policy in the City Code and the subsequent rezoning of the property.
>
> Multi-family uses are not permitted in the RS-12 zone.

The BOA also specifically found "the decision as to whether a court order issued in 198[7] preserves the rights of the property owner to develop the properties according to R3B zoning is not within the authority of the Board of Adjustment."

TSB appealed the BOA's denial to the district court through a petition for writ of certiorari and request for declaratory relief. Approximately three months before trial, the BOA sought to amend its answer to include for the first time four affirmative defenses, including failure to state a claim upon which relief may be granted, res judicata, statute of limitations, and laches. The district court denied the motion to amend after finding the amendment would substantially change the issues in the case and TSB would be prejudiced by the late filing. The court granted TSB's motion in limine to prohibit evidence supporting these defenses at the trial.

A bench trial commenced on January 5, 2016, and the district court issued a decision in the BOA litigation in March, concluding the *Kempf* ruling "was personal to Mr. Kempf" "to allow Kempf the opportunity to realize his investment-

backed expectations by completing his development plan." The court held the language in the remand order in *Kempf*, which provided the remand applied to the owner or owners and their successors and assigns, did not apply to TSB in light of the intervening property owners, who did not intend to construct apartment buildings on the property, and in light of the fact the land was not sold at one time as one tract.

The district court further held that Kempf had already established a use on the property by constructing one apartment building and granting the electrical easement following the remand, which meant TSB's plan would be a redevelopment of the property that must comply with the existing zoning ordinances. Finally, the district court concluded that public policy strongly favored the City's denial of the site plans under the City's zoning power:

> To permit [TSB] to construct [its] proposed building on the property at this time would create an unworkable situation when it comes to how the rest of the neighborhood is zoned, and would be against public policy interests that exist with respect to a City's right to amend zoning ordinances when circumstances justify such action.

TSB separately appeals the district court decisions. We have consolidated these cases for the purpose of issuing one opinion in relation to the development of this property.

II. Scope and Standards of Review.

A. The City Action: We review the district court's grant of a motion for summary judgment for correction of errors at law. *City of Johnston v. Christenson*, 718 N.W.2d 290, 296 (Iowa 2006). "Summary judgment is properly granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as

to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.* (quoting Iowa R. Civ. P. 1.981(3)).

B. The BOA Action: Our review of the district court decision annulling the petition for writ of certiorari and the court's decision denying the request for declaratory judgment is also for the correction of errors at law. *See Stream v. Gordy*, 716 N.W.2d 187, 190–91 (Iowa 2006).

> "A writ of certiorari lies where an inferior tribunal, board, or official, exercising judicial functions, has exceeded its proper jurisdiction or otherwise acted illegally." In such an action, the person seeking the writ has the burden of proof. Review of a certiorari proceeding is for correction of errors at law.
>
> Likewise, "[a] declaratory judgment action tried at law limits our review to correction of errors at law. We are bound by well-supported findings of fact, but are not bound by the legal conclusions of the district court."

Id. (citations omitted) (alteration in original).

III. The City Action—Rezoning.

TSB claims the district court erred in its legal conclusion that the City's action in rezoning the properties in question did not violate the district court's supplemental order following the supreme court's remand in *Kempf*. TSB contends the supplemental remand order is an injunction that prohibits the City from "interfering with development of [the] properties" in question and the rezoning of the properties to a classification that does not allow for high density residential development interferes with its injunctive power of development. In support of the interference, TSB points to the fact the BOA denied its site plan for the properties based solely on the City's rezoning decision. It contends the rezoning was the proximate cause of the BOA's site plan denial and the BOA had no power or authority but to apply the zoning ordinance in effect. *See Johnson v.*

Bd. of Adjustment, 239 N.W.2d 873, 886 (Iowa 1976) ("Simply stated, a board of adjustment cannot disregard the provisions of, nor exceed the power conferred by, a zoning ordinance."). TSB thus contends the illegality stems not from the BOA site plan denial but from the City's rezoning of the properties.

Initially, we note the district court should not have resolved TSB's action for declaratory judgment on the merits. First, the declaratory judgment action sought only prospective relief—a temporary injunction prohibiting the City from rezoning the property at issue. Once the zoning ordinance passed, the issue was moot. *See E. Buchanan Tel. Coop. v. Iowa Utils. Bd.*, 738 N.W.2d 636, 641 (Iowa 2007) (stating "issues pertaining to a temporary injunction become moot upon the issuance of a permanent injunction"); *In re Marriage of Greiner*, No. 12-0840, 2013 WL 105256, at *1 (Iowa Ct. App. Jan. 9, 2013) (holding application for injunction moot where event sought to be enjoined already occurred). Second, it is questionable whether the zoning ordinance could be challenged by declaratory judgment rather than by a petition for writ of certiorari. *See Sutton v. Dubuque City Council*, 729 N.W.2d 796, 800 (Iowa 2006) (providing the writ of certiorari is the exclusive remedy to "review the decisions of city councils or county boards of supervisors acting in a quasi-judicial capacity when the claimant alleges illegality of the action taken"). The parties have not raised the issues, however, and we need not dwell on them any further because the district court denied TSB's requested relief in its consolidated ruling on both cases.

The grounds for challenging the legality of municipal zoning ordinance are limited. Our supreme court set out the relevant framework:

> City zoning ordinances, including any amendments to them, enjoy a strong presumption of validity. The burden is on the person challenging the ordinance to rebut the presumption and demonstrate the ordinance's invalidity. To carry this burden, the challenger must show the ordinance is unreasonable, arbitrary, capricious or discriminatory, with no reasonable relationship to the promotion of public health, safety, or welfare.
>
> In considering the challenger's claim, the court will not substitute its own judgment for that of the city council by passing on the wisdom or propriety of the ordinance. If the ordinance is facially valid and its "reasonableness" is "fairly debatable," the court will not interfere with the city's action.
>
> "An ordinance is valid if it has any real, substantial relation to the public health, comfort, safety, and welfare, including the maintenance of property values." Our prime consideration is the general purpose of the ordinance, not the hardship it may impose in an individual case. We do not focus on individual hardships because property owners in the area affected by a zoning ordinance, as well as adjacent landowners, have no vested right to the continuation of the current zoning. Thus, we will not declare an ordinance invalid simply because it adversely affects a particular property owner.

Shriver v. City of Okoboji, 567 N.W.2d 397, 401 (Iowa 1997) (internal citations omitted).

We find the district court's decision must be affirmed for two separate reasons. The first is based upon the language in *Kempf* and the remand order; the second based upon a recent supreme court opinion that terminated the effect of the remand order injunction after the expiration of twenty years—in this case in 2007.

A. *Kempf* and remand order language.

We begin by noting what the *Kempf* opinion and the supplemental remand order said and what they did not say. It all began with a dispute over the rezoning of the properties in question, which eventually brought the *Kempf* case to the supreme court. *Kempf*, 402 N.W.2d at 398. In resolving the case, the

supreme court found the application of the rezoning ordinances to Kempf's properties "would be unreasonable and therefore invalid" because the rezoning would make any development on the properties not "economically feasible." *Id.* at 400–01. However, the court went on to explain that the ordinances "*may apply* to the Kempf property, provided, however, that Kempf shall be permitted to proceed with the development of apartment buildings, as shown by the record in this case, to the extent that such buildings conform to the ordinances in effect prior to the 1978 rezoning." *Id.* at 401 (emphasis added). The supreme court specifically reversed the district court's initial decision that had declared the rezoning ordinances "void" and had imposed the zoning in effect before the ordinances were passed. *Id.* The supreme court also noted further development or redevelopment on the properties beyond that contemplated by Kempf would be subject to the 1978 rezoning ordinances. *Id.* Even TSB acknowledges "the injunction in the Remand Order does not specifically state that the City may not rezone the Property."

In its supplemental remand order, the district court deleted the language in its earlier order that had voided the ordinances and had ordered the property to return to the pre-1978 zoning designation (R3B). It then held the 1978 rezoning was "unreasonable, arbitrary, and capricious" and ordered the "owner or owners of said properties, *and their successors and assigns* shall be permitted to develop those properties with multiple dwellings (apartments) in accordance with the provisions applicable to the R3B zone in effect on May 30, 1978." (Emphasis added.) It further ordered: "Once a use has been developed or established on any of the above-described properties, further development or redevelopment of

that property shall be subject to the zoning ordinances in effect at the time such further development or redevelopment is undertaken."

Thus, both the supreme court's opinion and the supplemental remand order contemplated a zoning designation on the properties that did not authorize the development of high-density residential apartments. The focus of the *Kempf* opinion and the supplemental remand order was not the zoning designation that could be applied to the properties at issue but rather the ability of Kempf and his successors or assigns to develop the property *in spite* of whatever zoning may be applied on the property. *Id.* (ordering the current rezoning ordinance "*may apply* to the Kempf property, provided, however, Kempf shall be permitted to proceed with the development of apartment buildings . . . to the extent that such buildings conform to the ordinances in effect prior to the 1978 rezoning" and any further development or redevelopment "will be subject to the amended ordinances" (emphasis added)). The 1978 rezoning ordinances were not held to be void but only held to be inapplicable to Kempf's development plans. *Id.*

While the *Kempf* decision did not void the 1978 rezoning ordinance, it did enjoin the City from prohibiting the development of the 2.12-acre portion of Kempf's properties with apartment buildings. *Id.* ("The city shall be enjoined from prohibiting this use of the property by Kempf."). Likewise, the district court in the remand order instituted an injunction against the City with respect to the 2.12 acres—"The City is and shall be enjoined from interfering with development of those properties as herein provided." Therefore, we agree with the district court's decision the City's rezoning did not violate the *Kempf* rulings. As the district court found: "The City had the power to rezone [TSB's] property, as delegated to

it by the State of Iowa. . . . To permanently enjoin the City from rezoning would prevent the City from faithfully performing its zoning powers."

B. Expiration of the *Kempf*/remand order injunction.

TSB's claim for relief against the City fails for a second reason. TSB had the burden to establish the rezoning ordinance was in contravention of *Kempf* and the remand order imposing an injunction against such action by the City. As part of its proof, TSB was required to prove the *Kempf* injunction was still valid and enforceable. But it is not.

After the appeal in this case was filed, the supreme court decided *Dakota Railroad*, 898 N.W.2d at 138.[2] At issue in that case was whether a "1977 judgment granting an injunction of unspecified duration against a former owner of [a] right-of-way [was] enforceable nearly forty years later through a contempt action against a subsequent purchaser." *Dakota Railroad*, 898 N.W.2d at 129. The supreme court held the judgment "*expired* under Iowa Code section 614.1(6)" and was not enforceable. *Id.* (emphasis added).

Here, *Kempf* was decided in 1987. The remand order was issued in 1987. According to *Dakota Railroad* the injunction thus "expired" in 2007 and is now without any further force or effect. *See id.* at 135 ("Because the judgment granting injunctive relief was not renewed before it expired, DM & E contends it may not be held in contempt for failing to perform its mandates. We agree. Since we conclude the contempt proceedings purport to enforce an injunction that lapsed in 1997, we do not reach the other statutory, constitutional, and

[2] The supreme court opinion in *Dakota Railroad* was issued while these appeals were pending. We then asked for and received from the parties supplemental briefs on the impact of *Dakota Railroad* on these appeals.

prudential issues raised in the district court."); *id.* at 138 ("The twenty-year period commenced when the judgment was entered. Because the 1977 judgment was not renewed, it expired in 1997, well before the attempt to enforce it against DM & E was commenced."). TSB cannot rely on an "expired" judgment that established the injunction to claim illegality of the City's rezoning of the property in issue.

We affirm the district court's grant of the City's summary judgment motion. However, that is not the end of the story. TSB also challenges the BOA's denial of its site plan that it contends complied with the *Kempf* rulings.

IV. The BOA Action—Site Plans.

After a bench trial on TSB's claims the BOA acted illegally in denying its site plans, the district court agreed with the BOA that the supreme court's opinion in *Kempf* and the subsequent remand order did not apply to TSB. Specifically, the district court agreed with the BOA that TSB was not a "future owner" or an "owner or owners and their successors and assigns" within the meaning of the remand order. It also concluded that the 2.12-acre portion of the properties had already been developed or established such that any work done by TSB would be a redevelopment that must comply with the current zoning for the property. Because of these conclusions, the district court determined the BOA did not act illegally in denying TSB's site plans and it would be a violation of public policy to permit TSB to develop the property as proposed. TSB challenges the district court's conclusions.

TSB's appeal of the district court ruling is based upon its claimed rights under the supreme court *Kempf* opinion and the remand order. However, as

noted above, the injunction in the remand order upon which TSB relies, under *Dakota Railroad*, expired in 2007 and no longer provides it any legal footing. For this reason, we need not specifically address the issues regarding the district court's interpretation of *Kempf* and the remand order with respect to "future owner," "successors or assigns," and "development" and "redevelopment" of the properties. Nor do we need to address whether applying *Kempf* and the remand order to the proposed site plan would violate public policy. In addition, TSB concedes its claim the BOA acted illegally "stands or falls with the vitality of *Kempf* and the remand order." Because *Kempf* and the remand order expired in 2007, the BOA did not act illegally in failing to apply those orders to TSB's site plans.

TSB is left in something of a quandary, and it raised the issue in this appeal. TSB concedes Iowa City had the authority to rezone the properties at issue in accord with the City's comprehensive plan. TSB also concedes the BOA acted properly in denying TSB's appeal based on the zoning ordinances in place at the time. TSB's real argument is that the denial of the site plan was an interference with the development of the properties at issue in contravention of *Kempf* and the remand order. The correct method for raising this challenge was an application for order to show cause, as in *Dakota Railroad.* 898 N.W.2d at 133–34. As set forth above, based upon *Dakota Railroad*, it seems doubtful now that TSB would be entitled to any relief under the *Kempf* injunction as it has expired, but since TSB did not file an application for order to show cause that issue is not before us. The narrow issues before us are whether the City acted illegally in passing a zoning ordinance and whether the BOA acted illegally in

denying TSB's site plan in light of the *Kempf* decision and remand order. Ultimately, because the injunction imposed under *Kempf* is now expired, we cannot conclude the City or the BOA acted illegally under the circumstances.

V. The BOA Action—Motion to Amend Answer.

In its cross-appeal, the BOA asserts the district court abused its discretion in denying its motion to amend its answer to add affirmative defenses, particularly the defense of the statute of limitations applicable to a judgment of record under Iowa Code section 614.1(6). In light of our affirmance of the district court in the BOA action, this issue is now moot, and we need not address it further.

VI. The City Action—Notice Pleading.

Finally, TSB claims the court erred in ruling on its 1.904(2) motion that it did not meet the notice pleading requirements for its takings claim. In light of our decision affirming the district court's decision in favor of the BOA and the City, TSB's claim that the rezoning of his property resulted in an unconstitutional taking is now ripe for resolution.

Iowa is a notice-pleading state. *Rieff v. Evans,* 630 N.W.2d 278, 292 (Iowa 2001); *see* Iowa R. Civ. P. 1.402(2)(a). Under notice pleading, a party is not required to plead or identify specific legal theories of recovery or even allege ultimate facts supporting a claim. *Am. Family Mut. Ins. Co. v. Allied Mut. Ins. Co.*, 562 N.W.2d 159, 163 (Iowa 1997). A petition must contain factual allegations that give the defendant fair notice of the claim asserted so the defendant can adequately respond to the petition. *Id.* "The 'fair notice' requirement is met if a petition informs the defendant of the incident giving rise to

the claim and of the claim's general nature." *U.S. Bank v. Barbour,* 770 N.W.2d 350, 353 (Iowa 2009). A pleader need not even identify specific legal theories in a petition. *Cemen Tech. Inc. v. Three D Indus., L.L.C.*, 753 N.W.2d 1, 12 (Iowa 2008) (citing *Roush v. Mahaska State Bank*, 605 N.W.2d 6, 9 (Iowa 2000)).

In this case, TSB alleged that the passing of ordinance 13-4518 would result in an unconstitutional taking of its property. In addition, TSB's petition in CVCV075457 contains a prayer for general equitable relief—"Plaintiff prays that [sic] for such further relief as the court deems just and equitable in the premises." Such a prayer is liberally construed and "will often justify granting relief in addition to that contained in the specific prayer, provided it fairly conforms to the case made by the petition and the evidence." *Lee v. State*, 844 N.W.2d 668, 679 (Iowa 2014).

The issue before the trial court was whether TSB's petition provided the City notice of the incident giving rise to its takings claim and the general nature thereof. The admitted failure of the petition in CVCV075457 to have a separate takings claim or claim for damages is not fatal. TSB's petition, which called the rezoning an unconstitutional taking of TSB's properties, puts the City on fair notice of the facts giving rise to the claim and its general nature. The City had notice of such a claim all along and has never contended otherwise. TSB's petition provided: "If the property is downzoned, it will result in a substantial decrease in value of the property, and likely a claim for damages against the City." *See Rick v. Boegel*, 205 N.W.2d 713, 715 (Iowa 1973) ("When the petition is not attacked until after [the] answer, the petition will be liberally construed in favor of plaintiff so as to effectuate justice, and pleader will be given advantage of

every reasonable intendment."). Given the allegations in TSB's petition and the applicable liberal pleading rules, the trial court erred in concluding that TSB's petition did not meet notice pleading requirements. The district court's ruling must be reversed and the case remanded for further proceedings on TSB's takings claim.

VII. Conclusion.

With respect to the City rezoning action, we agree the district court correctly granted summary judgment to the City because the rezoning of the property in 2013 did not violate the *Kempf* decision or the remand order. Further, based upon the supreme court case of *Dakota Railroad,* the injunction in the remand order based upon *Kempf* expired in 2007, and thus, it could not have barred the City's rezoning in 2013.

We also affirm the district court's decision in the BOA action that the BOA did not act illegally in denying TSB's site plans, but for reasons different from those expressed by the district court. We also conclude the BOA's cross-appeal as to the district court denying the BOA's motion to amend its answer to add affirmative defenses is moot. Finally, we conclude the district court erred in finding TSB had failed to assert a takings claim in its petition against the City and remand that claim to the district court for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Doyle, P.J., and McDonald, J., concur specially.

MCDONALD, Judge (concurring specially).

I concur in full with the majority's well-reasoned resolution of the issues presented in this consolidated appeal. I write separately to address *Dakota, Minnesota & Eastern Railroad v. Iowa District Court* (*Dakota Railroad*), 898 N.W.2d 127 (Iowa 2017), and to offer additional reasons for affirming the judgments of the district court independent of any reliance on *Dakota Railroad*.

I.

I concur in the majority's interpretation of *Dakota Railroad* and its application to the facts of this case. To prove the City or the BOA acted illegally, TSB was required to prove the *Kempf* injunction was enforceable, that TSB had rights under the *Kempf* injunction, and the City or the BOA acted contrary to TSB's rights under the *Kempf* injunction. *See Bd. of Adjustment v. Ruble*, 193 N.W.2d 497, 503 (Iowa 1972). *Dakota Railroad* dictates the conclusion the *Kempf* injunction expired of its own force after twenty years and TSB is thus not entitled to any relief under the injunction. *See Dakota Railroad*, 898 N.W.2d at 138. With respect to this conclusion, although I agree with the majority's interpretation of *Dakota Railroad*, I confess doubt. Does *Dakota Railroad* really mean what is says? Do all judgments "expire" of their own force if not renewed within twenty years? There are several reasons to think not.

The text of the relevant statute does not provide judgments "expire" after twenty years. *Dakota Railroad* states "[t]he Iowa legislature has expressly constrained the *duration of judgments* by prescribing that '[a]ctions may be brought within the times herein limited . . . and not afterwards.'" *Id.* at 140 (emphasis added) (quoting section 614.1) (alteration in original). Except the

statutory provision cited does not regulate the "duration of judgments." It regulates only when "[a]ctions may be brought" to enforce a judgment. Iowa Code § 614.1 (2013). The statute provides that an "action" "founded on a judgment of a court of record" must be brought "within twenty years." Iowa Code § 614.1(6). The statute does not provide the judgment "expires" after twenty years; it provides only that an "action" on a judgment cannot be brought after twenty years. To flesh out the distinction, consider another provision in the same section. The statute of limitations provides that an "action" "founded on written contracts" must be brought "within ten years." Iowa Code § 614.1(5). The statute does not provide a written contract expires within ten years; it provides only that an "action" on a written contract cannot be brought after ten years. In contrast, when the legislature intends to regulate the duration of a judgment such that the judgment expires after a certain period of time, it has used language requiring that result. *See* Iowa Code § 615.1 (providing that certain judgments related to real estate shall be "null and void" after two years); *U.S. Bank Nat'l Ass'n v. Lamb*, 874 N.W.2d 112, 119 (Iowa 2016) (interpreting section 615.1 to mean "judgment lien is null and void after the passage of two years from the date of judgment").

Dakota Railroad also ignores the accrual language in the statute of limitations. Section 614.1 provides "[a]ctions may be brought within the times herein limited, respectively, after their causes accrue." *Dakota Railroad* holds the twenty-year period commences on the date of judgment entry and the judgment expires if not renewed prior to the twenty-year period. *See* 898 N.W.2d at 138 ("The twenty-year period commenced when the judgment was entered. Because

the 1977 judgment was not renewed, it expired in 1997, well before the attempt to enforce it against DM & E was commenced."). It may be true that a cause of action on a money judgment accrues on the date of judgment. It may also be true that a cause of action to enforce an injunction compelling affirmative action—i.e., the injunction at issue in *Dakota Railroad*—accrues on the date of judgment entry. However, it is not true that a cause of action on all judgments or injunctions accrues on the date of judgment entry. Consider, for example, the injunction in this case. The injunction in this case restrained an interference with rights. The City was prohibited from interfering with Kempf's development of the properties. Assume Kempf had kept the properties but not submitted a site plan until after twenty years had passed. If the City then denied the site plan, the cause of action would not have accrued until the denial of the site plan in contravention of the injunction. *Dakota Railroad* appears to hold the judgment expires after twenty years without regard to when the action accrues. This seems contrary to the plain language of the statute.

There is a third textual difficulty with *Dakota Railroad*. At issue in that case was an Iowa judgment, and the court held the "duration" of the judgment was twenty years and the judgment expired if not renewed within the twenty-year period. *See id.* However, the statute of limitations applies to more than Iowa judgments. Section 614.1(6) sets forth the statute of limitations for any action to enforce any "judgment of a court of record, whether of this or of any other of the United States, or of the federal courts of the United States." While the Iowa legislature has the authority to regulate the duration of judgments entered in Iowa, the legislature does not have the authority to regulate the duration of

judgments issued by other states or federal courts. Instead, it has the authority to regulate when causes of action on those judgments must be filed in this state. The fact that the Iowa legislature can regulate only causes of action to enforce foreign judgments rather than the actual duration of foreign judgments strongly indicates the statutory provision at issue does not regulate the duration of judgments.

There is also a doctrinal reason to conclude *Dakota Railroad* did not mean what it said. It is not disputed the chapter at issue sets forth the statute of limitations on causes of action. A statute of limitations is an affirmative defense that must be raised by the party relying on the defense, which then has the burden of proving the claim is time-barred. If the defense is not pleaded, then it is waived. *See Cuthburtson v. Harry C. Harter Post No. 839 of the V.F.W.*, 65 N.W.2d 83, 87 (Iowa 1954) (stating "a party relying upon the statute of limitations as a defense must specifically plead that fact and he must also show the facts constituting the bar" and "[a] failure to plead a limitation statute operates as a waiver of this defense"). It is reversible error for the district court to raise the statute of limitations sua sponte. *See, e.g., Carter v. Fleener*, No. 10-1970, 2011 WL 5867061, at *7 (Iowa Ct. App. Nov. 23, 2011) (reversing judgment where the district court raised statute of limitations sua sponte). However, concluding a judgment expires if not renewed within twenty years means the judgment is void and the court would be required to raise the issue on its own motion. For this reason, the holding of *Dakota Railroad* is not in accord with our case law regarding affirmative defenses.

Finally, it seems *Dakota Railroad* creates some practical problems with respect to real property. Rights in real property are frequently established by legal judgment. For example, in *Murrane v. Clarke County*, 440 N.W.2d 613, 615 (Iowa Ct. App. 1989), this court affirmed a judgment establishing an easement by prescription. In *Maisel v. Gelhaus*, 416 N.W.2d 81, 89 (Iowa Ct. App. 1987), this court affirmed a permanent injunction barring certain landowners "from obstructing the natural flow of surface waters across their property." What is the status of these judgments after *Dakota Railroad*? Has the permanent injunction in *Maisel* expired of its own force? Is the restrained property owner now free to obstruct the natural flow of surface waters across their property to the detriment of the prevailing landowners? Under *Dakota Railroad*, it appears so.

Perhaps the above-stated concerns warrant a narrower reading of *Dakota Railroad*. Perhaps *Dakota Railroad* merely stands for the proposition that a cause of action to enforce a judgment expires twenty years after the cause of action accrues. While that reading of *Dakota Railroad* might address the concerns raised here, it does not jibe with the language of the opinion. It seems clear *Dakota Railroad* intends to limit the duration of judgments rather than causes of actions to enforce judgments. Indeed, the court specifically rejected persuasive authority that took the more narrow approach:

> The twenty-year period commenced when the judgment was entered. Because the 1977 judgment was not renewed, it expired in 1997, well before the attempt to enforce it against DM & E was commenced. To hold otherwise would be to determine that proceedings to enforce an injunction initiated by an application to show cause or other postjudgment motion would be subject to no limitations period and thus "forever hold the defendant in fear of enforcement with no hope of repose."
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> . . . .

> We acknowledge that an Illinois court has decided a similar issue differently. In *People ex. rel. Illinois State Dental Society v. Norris*, the court rejected an argument that a writ of injunction lapsed under a statute of limitations on judgments, stating,
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> > On appeal the defendant first argues that the 1968 writ of injunction lapsed and became unenforceable because the injunction judgment had not been renewed by the plaintiffs through scire facias or other proceedings within seven years of its issuance. The defendant further contends that since the injunction expired prior to November of 1976, he should not have been subjected to contempt proceedings for acts allegedly committed in November and December of that year. We disagree. An injunction remains in full force and effect until it has been vacated or modified by the court which granted it or until the order or decree awarding it has been set aside on appeal. Such a decree or order must be obeyed, even if erroneous, until it is overturned or modified by orderly processes of review. An injunction can be modified or dissolved when the court finds that the law has changed or that equity no longer justifies a continuance of the injunction.
>
> 398 N.E.2d 1163, 1168 (Ill. App. Ct. 1979) (citations omitted). Because we believe our statutory framework requires a different outcome, we do not find the Illinois court's decision persuasive.

Dakota Railroad, 898 N.W.2d at 138–40. In addition, it would be hard to conclude the opinion relates to the statute of limitations when the word "accrue" does not appear anywhere in the opinion. Thus, despite my concerns regarding *Dakota Railroad*, like the majority, I take it at its word. The injunction at issue had a duration of twenty years and expired in 2007. It thus affords no ground of relief for TSB.

II.

Even assuming the *Kempf* injunction did not expire of its own force, there are additional reasons—beyond those discussed in the majority opinion—to

conclude TSB is not entitled to any relief with respect to its actions challenging the zoning ordinance.

First, TSB failed to prove the City's adoption of the ordinance was illegal, arbitrary, or capricious within the meaning of the relevant statutes and controlling case law. Chapter 414 of the Iowa Code empowers cities to engage in zoning for "the purpose of promoting the health, safety, morals, or the general welfare of the community." Iowa Code § 414.1. To avail itself of the zoning powers conferred by chapter 414, a municipality is required to appoint a "zoning commission," which shall "recommend the boundaries of the various original districts and appropriate regulations and restrictions to be enforced therein." Iowa Code § 414.6. Once a zoning commission has been established, the power to regulate land use must be done "in accordance with a comprehensive plan." Iowa Code § 414.3. The regulations and restrictions adopted "shall be uniform for each class or kind of buildings throughout each district." Iowa Code § 414.2. Any "regulation, restriction, or boundary shall not become effective until after a public hearing at which parties in interest and citizens shall have an opportunity to be heard." Iowa Code § 414.4. Here, the challenged ordinance was in accord with the City's comprehensive plan. The city council set a public hearing on the proposed ordinance, published notice of the hearing, and held the hearing as scheduled. After the public hearing, the ordinance was adopted. All of the City's actions were in accord with chapter 414 of the Code and Iowa City Code of Ordinances. There was no illegality in the manner in which the challenged ordinance was passed.

Second, the relief afforded in *Kempf* was personal to Kempf and not available to TSB. The supreme court stated "Kempf shall be permitted to proceed with the development of the apartment buildings." *Kempf v. City of Iowa City*, 402 N.W.2d 393, 401 (Iowa 1987). The supreme court enjoined the city "from prohibiting this use of the property by Kempf." *Id.* The supreme court then remanded the matter to the district court for "disposition in conformance with this opinion." *Id.* The language of the remand order was far broader than the *Kempf* opinion. The pertinent part provides:

> The owner or owners of said properties, and their successors and assigns, shall be permitted to develop those properties with multiple dwellings (apartments) in accordance with the provisions applicable to the R3B zone in effect on May 30, 1978, prior to the rezoning of said real estate which was finalized on June 28, 1978.

TSB cannot challenge the City's zoning ordinance as a successor or assign within the meaning of the remand order, however. "[T]he district court upon such remand [was] limited to do the special thing authorized by the appellate court in its opinion and nothing else." *In re Marriage of Davis*, 608 N.W.2d 766, 769 (Iowa 2000) (citing *Kuhlmann v. Persinger*, 154 N.W.2d 860, 864 (Iowa 1967)). The district court lacked authority to do anything beyond the mandate. On our own motion, we are required to treat as "null and void" anything in the remand order beyond the scope of the mandate. *See Davis*, 608 N.W.2d at 769. Simply put, TSB had no rights under *Kempf*. TSB thus cannot meet its burden in establishing the City acted illegally with respect to TSB.

III.

Even assuming the *Kempf* injunction did not expire of its own force, there are additional reasons—beyond those stated in the majority opinion—to conclude TSB is not entitled to any relief with respect to its challenge to the BOA's action.

By way of background, the Code requires any city council exercising zoning authority to create a board of adjustment. *See* Iowa Code § 414.7. "Under the general statutory scheme of city zoning in this State, the power to grant variances and exceptions is exercised solely by the board of adjustment." *City of Johnston v. Christenson*, 718 N.W.2d 290, 298 (Iowa 2006). The board of adjustment's authority to grant variances and exceptions and otherwise act is limited by the statutes and ordinances creating the board of adjustment. As relevant here, the statute provides the board with the authority:

> 1. To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of this chapter or of any ordinance adopted pursuant thereto.
> 2. To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.
> 3. To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where owing to special conditions a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

Iowa Code § 414.12.

With respect to these statutory powers, "[a]n illegality is established if the board has not acted in accordance with a statute; if its decision was not supported by substantial evidence; or if its actions were unreasonable, arbitrary,

or capricious." *Geisler v. City Council*, 769 N.W.2d 162, 168 (Iowa 2009). TSB bears the burden of proving an entitlement to relief.

I first address the question of whether the BOA illegally exercised its powers under section 414.12(1). Pursuant to this provision, the BOA may "hear and decide appeals where it is alleged there is error in any . . . decision . . . made by an administrative official." Iowa Code § 417.12; *Fetkether v. City of Readlyn*, 595 N.W.2d 807, 811 (Iowa Ct. App. 1999).

> In exercising the above mentioned powers, the board of adjustment may, in conformity with the provisions of this title or ordinances adopted pursuant thereto, affirm, or upon finding error, reverse or modify, wholly or partly, the order, requirement, decision or determination appealed from and may make such order, requirement, decision or determination as ought to be made, and to that end, shall have all the powers of the officer from whom the appeal is taken.

Iowa City Municipal Code § 14-8C-3(B)(4). As seen from the plain language of the statute and ordinance, the BOA exercises only limited administrative and quasi-judicial powers when reviewing the decision of a city official pursuant to this provision. *See Depue v. City of Clinton*, 160 N.W.2d 860, 863 (Iowa 1968) (stating "[t]he foregoing cases all indicate an interpretive history for Chapter 414 which would require the city to place *what we have called the quasi-judicial function of granting special exceptions in the board of adjustment*" (emphasis added)). The board does not have legislative power to amend ordinances or grant relief contrary to statutes or ordinances. *See Greenawalt v. Zoning Bd. of Adjustment*, 345 N.W.2d 537, 544 (Iowa 1984) ("The board, therefore, merely has authority to determine whether exceptions to an ordinance are to be allowed. It cannot amend or change an ordinance or declare an ordinance

unconstitutional."); *Johnson v. Bd. of Adjustment*, 239 N.W.2d 873, 886 (Iowa 1976) ("Simply stated, a board of adjustment cannot disregard the provisions of, or exceed the power conferred by, a zoning ordinance."); 8A Eugene McQuillin, *The Law of Municipal Corporations* § 25.256 at 408 (3d ed. 2012).

With the foregoing principles in mind, I cannot conclude the BOA acted illegally in reviewing the City's denial of TSB's site plan pursuant to section 414.12(1). TSB concedes this issue, stating "the illegality stems not from the BOA's denial of TSB's site plan but from the passage of ordinance 13-4518 which served as the reason for the denial of TSB's site plan." TSB's concession is a correct statement of law. The controlling statutes do not provide the BOA with authority to negate or ignore a zoning ordinance. Under the controlling statutes and ordinances, the BOA was only empowered to correct a decision of the official where the official's decision was contrary to the city's ordinances. The BOA has no power to interpret or apply the injunction at issue to void the City's action. TSB thus failed to prove the board acted in violation of section 414.12(1).

I next address whether TSB proved the BOA violated section 414.12(2) or (3). Pursuant to these provisions, a board may be empowered to grant variances, special exceptions, and provisional uses. *See* Iowa City, Iowa, Ordinance Nos. 14-8C-2; 14-4B-3; 14-4B-4. The applicant has the burden of proving all of the criteria necessary to obtain a variance or exception by a preponderance of the evidence. *See id.* While the ordinances allow for certain variances and use exceptions, they do not allow a variance or exception that would allow a land use other than that specifically allowed in the zoning district in which the property is located. *See* Iowa City Ordinance Nos. 14-4B-2, 3, 4; *see*

also Graziano v. Bd. of Adjustment, 323 N.W.2d 233, 237 (Iowa 1982) ("The board cannot alter the zoning ordinances by granting variances; it may not legislate."); 8A Eugene McQuillin, *The Law of Municipal Corporations* § 25.257 at 411 (3d ed. 2012) (stating "boards are created mainly to deal with situations calling for permits, variances, and similar matters, not as a legislative body to correct errors of judgement in zoning laws").

With these principles in mind, I conclude TSB has not proved the BOA improperly denied a request for a variance or exception. TSB concedes it did not request a variance or special exception. Even if TSB had not conceded the issue, the claim would fail. TSB has not identified the statutory provision the board allegedly violated. TSB has not identified the ordinance the board allegedly violated. Indeed, the ordinances specifically prohibit the board from granting a variance or exception that would allow a land use other than that specifically allowed in the zoning ordinance. *See* Iowa City Ordinance Nos. 14-4B-2, 3, 4. The BOA has no authority to grant an application for a variance, exception, or conditional use permit that fails to satisfy the requirements of the ordinances. *See W & G McKinney Farms, L.P. v. Dallas County Bd. of Adjustment*, 674 N.W.2d 99, 103–04 (Iowa 2004). TSB is thus not entitled to relief on these grounds.

IV.

For the foregoing reasons, I concur in full with the disposition of the consolidated appeals.

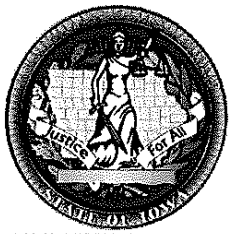
DOYLE, Presiding Judge (concurring specially).

I concur with the disposition of the consolidated appeals, but write separately to express my wholehearted agreement with Judge McDonald's insightful analysis of *Dakota Railroad*. Despite our concerns with *Dakota Railroad*, ours is not to reason why, ours is but to do and apply.[3] As an intermediate court of appeals, we are restrained from ignoring or disturbing Iowa Supreme Court precedent. *See State v. Hastings*, 466 N.W.2d 697, 700 (Iowa Ct. App. 1990) ("We are not at liberty to overturn Iowa Supreme Court precedent."); *see also State v. Miller*, 841 N.W.2d 583, 584 n.1 (Iowa 2014) ("Generally, it is the role of the supreme court to decide if case precedent should no longer be followed."); *State v. Hughes*, 457 N.W.2d 25, 28 (Iowa Ct. App. 1990) ("If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves." (quoting *State v. Eichler*, 83 N.W.2d 576, 578 (Iowa 1957))).

[3] Apologies to Alfred, Lord Tennyson, who wrote:

> Someone had blundered:
> Theirs not to make reply,
> Theirs not to reason why,
> Theirs but to do or die.

See Alfred Tennyson, *The Charge of the Light Brigade*, The Examiner, Dec. 9, 1854, at 780.



IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
15-1373	TSB Holdings v. City of Iowa City

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TRIAL COURT RULING, APPEAL NO. 15-1373

IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

TSB Holdings, L.L.C. and 911 N. Governor, L.L.C.,	)	
Plaintiffs,	)	
	)	**No. EQCV075292**
vs.	)	**No. CVCV075457**
City of Iowa City, Iowa,	)	**RULING**
Defendant.	)	

TSB Holdings, L.L.C. and 911 N. Governor, L.L.C.,	)	
Plaintiffs,	)	
	)	**No. CVCV076128**
vs.	)	
	)	**RULING**
Board of Adjustment for the City of Iowa City,	)	
Defendant.	)	

Hearing took place on March 20, 2015, on the following pending matters: Plaintiffs' Motion to Reconsider this Court's denial of Plaintiffs' Motion to Amend; Plaintiffs' Motion to Add a Party; Plaintiffs' Motion to Consolidate; Plaintiffs' Motion for Summary Judgment; and Defendant City of Iowa City, Iowa's Motion for Summary Judgment. Appearances were made by Attorneys Charles Meardon and James Affeldt on behalf of Plaintiffs, and by Assistant Iowa City City Attorney Sara Greenwood Hektoen. Tracy Barkalow appeared in person at the hearing. Having considered the file, relevant case law, and written and oral arguments of counsel, the Court hereby enters the following ruling:

FACTUAL AND PROCEDURAL BACKGROUND

CVCV075457

On April 17, 2013, Plaintiffs TSB Holdings, L.L.C. and 911 N. Governor, L.L.C. filed a Petition for Writ of Certiorari. Plaintiffs are limited liability companies that own property on North Dodge Street and North Governor Street in Iowa City. Plaintiffs complain that the Defendant, City of Iowa City, passed an ordinance on March 19, 2013, that changed the zoning classification of property owned by Plaintiffs, which precludes Plaintiffs from utilizing the property in the manner provided for in the Iowa Supreme Court case of Kempf v. City of Iowa City, 402 N.W.2d 393 (Iowa 1987), and Supplemental Orders on Remand that were entered by the Johnson County District Court. Plaintiffs contend the change in zoning classification was improper, unreasonable, arbitrary and capricious, illegal, contrary to prior rulings of the Iowa Supreme Court and the Johnson County District Court, and would result in an unconstitutional

taking of Plaintiff's property. Plaintiffs request the Court order that Defendant's rezoning of the property be annulled and declared void.

Defendant has denied the allegations of the Petition that are adverse to it.

A Return of Writ of Certiorari and Verification was filed on July 3, 2013.

The matter was consolidated with EQCV075292 on July 16, 2014, and the July 30, 2014 trial date was continued. The parties believe the matter may be capable of disposition on Motions for Summary Judgment, which have been filed in EQCV075292.

On October 13, 2014, the undersigned entered a Ruling/Order in all three cases. The Ruling/Order set the pending Motions for Summary Judgment, Motion to Add Party (filed by Plaintiffs in CVCV076128, discussed in more detail later in this Ruling), and Motion to Consolidate for hearing. The undersigned also ruled that Plaintiffs' Motion to Amend Petition, filed in EQCV075292, was denied. Plaintiffs sought to amend their Petition in EQCV075292 to add the issue of whether a 1980s zoning of the property at issue in this case violated the Iowa Supreme Court's holding in Kempf, and whether Plaintiffs still have vested rights in Kempf's development plans. Plaintiffs also proposed to request that the Court declare that Plaintiffs may develop the property consistent with Kempf and the Supplemental Orders entered in light of the remand of the Kempf case.

In denying the Motion to Amend Petition, the undersigned found:

> The Court concludes that the proposed amendment substantially changes the issues before the Court. Trial of this matter previously was continued so that the Court could consider whether the matter could be disposed of on summary judgment. The relevant issues to be litigated, as established by the original Petition, pertain to the City's 2013 rezoning of the property at issue in this case. This is a completely separate and distinct issue from the 1980s rezoning of the property. The Court agrees with Defendant's assertion that permitting the amendment would require additional discovery, and would necessitate a substantial redraft of Defendant's Motion for Summary Judgment since the issues currently raised therein would be changed by the amendment. Even when the liberal standard for considering motions to amend is applied, the Court concludes that, because the issues would be changed substantially if the amendment is permitted, Plaintiffs' Motion should be denied.

See Ruling/Order, filed October 14, 2014.

Plaintiffs now have filed a Motion to Reconsider the Ruling/Order.

EQCV075292

Plaintiffs TSB Holdings, L.L.C. and 911 N. Governor, L.L.C. filed a Petition for Declaratory Judgment and Temporary Injunction on February 18, 2013. Plaintiffs claim they have used the property in accordance with the ordinances and permitted manners of use

previously established by the 1987 proceedings, and TSB Holdings has attempted to obtain a building permit to allow the construction of three apartment/condominium groupings on the property, comprising 72 units, which construction would comply with the zoning and court orders currently in effect. Defendant City of Iowa City denied the permit, and Plaintiffs claim Defendants are attempting to rezone the property in a manner that will preclude Plaintiffs from making use of the property as provided for in the 1987 proceedings. Plaintiffs seek a declaratory judgment finding that Defendant may not alter the zoning of the property, and that if Defendant does so, the altered regulation is, to the extent it applies to the property, unconstitutional and void. Plaintiffs also seek a temporary injunction.

Defendant has denied the allegations of the Petition that are adverse to it, and has filed a Counterclaim for Declaratory Judgment. Defendant seeks a ruling that the Kempf decision does not limit the right of the City to rezone the subject property as currently proposed.

Plaintiffs have denied the allegations of the Counterclaim that are adverse to them.

Trial previously had been set for August 19, 2014, but has been continued so that the parties can seek rulings on their Motions for Summary Judgment.

Both parties filed Motions for Summary Judgment on July 18, 2014.

In Kempf, the City sought review on the question of whether the court had the power to order that the properties be returned to the former zoning designation. The Iowa Supreme Court held:

> [W]e hold that ordinances numbered 78-2901 through 78-2906 may apply to the Kempf property, provided, however, that Kempf shall be permitted to proceed with the development of apartment buildings, as shown by the record in this case, to the extent that such buildings conform to the ordinances in effect prior to the 1978 rezoning, with the exception of the controversial LSRD ordinance, which we hold inapplicable in this situation. The city shall be enjoined from prohibiting this use of the property by Kempf. Further development or redevelopment of the property beyond that contemplated by Kempf as shown by this record and noted in this opinion, whether carried out by Kempf or future owners, will be subject to the amended ordinances above designated.
>
> Support for this disposition, which neither leaves the property unzoned nor causes this court to assume legislative functions, is found in Schwartz v. City of Flint, 426 Mich. 295, 395 N.W.2d 678, 690-93 (1986).
>
> To the extent the 1978 zoning ordinance was declared void by the district court, the district court's ruling is reversed.
>
> We affirm in part, reverse in part, and remand to the district court for a disposition in conformance with this opinion.

Kempf, 402 N.W.2d at 401 (Iowa 1987).

On remand, the Johnson County District Court entered an Order allowing Kempf, his successors and assigns to construct apartment buildings on specifically-legally described parts of the property where such buildings were allowed under the pre-1978 zoning, and further provided that once a use has been developed or established on any of the relevant properties, further development or redevelopment of that property shall be subject to the zoning ordinances in effect at the time such further development or redevelopment is undertaken. The District Court also enjoined the City from interfering with the development of those properties as therein provided. The District Court's Order specifically held, in relevant part:

> The owner or owners of said properties, and their successors and assigns, shall be permitted to develop those properties with multiple dwellings (apartments) in accordance with the provisions applicable to the R3B zone in effect on May 30, 1978, prior to the rezoning of said real estate which was finalized on June 28, 1978.
>
> It is further ORDERED that the City's Large Scale Residential Development Ordinance shall not apply to development of those properties. The City is and shall be enjoined from interfering with development of those properties as herein provided.
>
> Once a use has been developed or established on any of the above-described properties, further development or redevelopment of that property shall be subject to the zoning ordinances in effect at the time such further development or redevelopment is undertaken.

See Supplementary Orders on Remand.

It appears that on October 8, 1998, Kempf applied for a building permit to construct a 12-unit apartment building on part of the property protected by the Remand Order, and the City issued the building permit over a year later. Plaintiffs claim that the only apartment building constructed subsequent to the Remand Order is the 12-unit building, and the only buildings currently on the property are the 29 and 12-unit apartment buildings, along with a DHS building.

Plaintiffs' properties are located in the middle of an older, largely single-family residential neighborhood. The area is surrounded by medium density, single-family RS-8 zones. In 2008, the City adopted a comprehensive Central District Plan, which details the long-range planning goals for a portion of the City, including Plaintiffs' properties. In developing the plan, the City conducted significant research and consulted with the public regarding the strengths, weaknesses, opportunities and threats facing this neighborhood. This area was considered to be one in need of assistance from the City to stabilize the balance between various housing types and mix of residents. Plaintiffs' properties were specifically identified as being in need of rezoning, but appropriate for low to medium density multi-family development.

In 2011, the Planning and Zoning Commission and City Council considered an application by a real estate developer to rezone three lots collectively known locally as 911 N. Governor, from CO-1, a commercial designation, to RM-12, a low-density multi-family

residential designation. This property was then owned by AB Investments, L.L.C. The City Council denied this application, finding the density allowed in the RM-12 zone was incompatible with the neighborhood. Council asked Staff to reexamine the Central District Plan with regard to this property, which was subsequently acquired by Plaintiff 911 N. Governor, L.L.C. in March of 2012, and the adjacent property owned by Plaintiff TSB Holdings, L.L.C.

The City staff further studied the neighborhood, and recommended that the Central District Plan map be changed to show Plaintiffs' properties as appropriate for single-family and duplex residential for Lots A, C and D[1]. Lot B1 and B2 remained unchanged as appropriate for open space and low to medium density multi-family, respectively. The City Council approved this amendment in 2012.

In December, 2012, City Staff initiated a rezoning of Lot A to RS-12, a high density, single family zoning designation; Lot B2 to RM-20, a medium density, multi-family residential zoning designation; and Lots C and D to RS-12 to be consistent with the Central District Plan map. The Planning and Zoning Commission considered the rezonings and recommended that the City Council approve them. The City Council set a public hearing, held the public hearing, and took the required three readings of the rezoning ordinance. On March 19, 2013, the City Council passed and adopted Ordinance No. 13-4518.

Plaintiffs claim that after amending its comprehensive plan in 2012, the City sought to downzone certain lots in the area in question that would prohibit construction of apartment buildings as proposed by TSB. The downzoning became effective on March 28, 2013. TSB states it is Kempf's successor in interest, and in January, 2013, TSB submitted a plan for a 30-unit apartment building on parts of the lots. The City denied TSB's January plan, and later denied TSB's April, 2013 plan. Plaintiffs claim the City's handling of TSB's site plans shows that the City used the proposed and ultimate downzoning of parts of the property protected by the Remand Order as justification for denying TSB's site plans, and the ultimate result of the City's position is that no apartment buildings may be constructed on any parts of the property protected by the Remand Order, notwithstanding the injunction therein prohibiting the City from interfering with development.

Plaintiffs' Motion for Summary Judgment

Plaintiffs' Motion is based on two arguments: the City failed to modify or dissolve the injunction from the Kempf litigation, and thus the downzoning of the property is rendered void as a matter of law; and the City's downzoning of the property interferes with completion of Kempf's plan, violates the Remand Order, and is void as a matter of law. Plaintiffs request the Court declare that TSB may construct apartment buildings as set forth in the Remand Order regardless of the zoning of the parts of the property subject to the Remand Order.

Defendant resists the Motion, arguing that the City's failure to modify or dissolve the injunction from Kempf does not render the downzoning void as a matter of law; the City's

[1] For ease of reference, the Court will refer to the lots rezoned by the City according to the letter designations shown on Exhibit B submitted by the City, which was originally provided to the Court as an exhibit to Karen Howard's Affidavit in support of the City's Motion for Summary Judgment.

rezoning did not interfere with Kempf's development plans, does not violate the Remand Order, and is not void as a matter of law; and Plaintiffs are not entitled to declaratory relief on summary judgment.

Defendant's Motion for Summary Judgment

Defendant, on the other hand, contends Kempf contains no express or implied language enjoining the City from rezoning Plaintiffs' properties, and to permanently enjoin the City from rezoning would be contrary to public policy. Defendant argues the new ordinance is facially valid and reasonable, in that the City Council complied with procedural requirements; the ordinance is consistent with the comprehensive plan; the ordinance is compatible with surrounding uses and zones; and the ordinance is substantially related to public health, safety, and welfare. Defendant claims it did not act illegally when it rezoned Plaintiffs' property.

Plaintiff resists, arguing that the City's 2013 downzoning of the property constitutes an illegality for certiorari purposes; the City's proferred reasons for downzoning the property in 2013 are no different from the reasons giving rise to the 1978 downzoning; the City's 1983 and 1985 zoning ordinances and the property's classifications resulting therefrom are of no legal significance; and Plaintiffs are entitled to declaratory relief to prevent the City from continuing its attempts to violate the remand order.

CVCV076128

Plaintiffs TSB Holdings, L.L.C. and 911 N. Governor, L.L.C. filed a Petition for Writ of Certiorari on January 9, 2014. Plaintiffs state that on May 24, 2013, they applied to the Board of Adjustment to modify the decision of the City of Iowa City's building department denying a variance for property owned by Plaintiffs. Plaintiffs further state that on December 12, 2013, Respondent Board of Adjustment of the City of Iowa City, Iowa denied the variance. Plaintiffs contend the action denying the variance was illegal. Respondent has denied the allegations of the Petition that are adverse to it.

On August 18, 2014, Plaintiffs filed their pending Motion to Add Party and Motion to Consolidate. Plaintiffs have moved to consolidate all three of these matters. Plaintiffs also have moved to add the City of Iowa City as an interested party in CVCV076128.

The Board resists the Motions, arguing that the City is not an indispensable party to a certiorari action against the Board of Adjustment, and consolidation would only confuse the issues before the Court.

CONCLUSIONS OF LAW

A. Plaintiffs' Motion to Reconsider

The Court finds that Plaintiffs have not met their burden to establish that the Court made a legal error in denying their Motion to Amend. This Motion to Reconsider is a reiteration of arguments Plaintiffs previously made in their Motion to Amend and is being used "merely to

obtain reconsideration of the district court's decision." Sierra Club v. Iowa DOT, 832 N.W.2d 636, 641 (Iowa 2013). Plaintiffs' Motion to Reconsider, therefore, is denied. The Court declines to enter an order "preserving TSB's right to request the relief outlined in its Amended Petition" as requested by Plaintiffs, finding that this order involves neither a final order on the above-captioned cases nor a separate, pending lawsuit arising from the same transaction.

B. Plaintiffs' Motion to Add Party

Plaintiffs verbally withdrew their Motion to add the City as a party to the TSB Holdings, L.L.C. et al. vs. Board of Adjustment for the City of Iowa City, CVCV076128, during the course of the March 20, 2015 hearing. Therefore, this Motion is no longer pending before the Court.

C. Plaintiffs' Motion to Consolidate

Plaintiffs seek to consolidate the two lawsuits against the City of Iowa City with the lawsuit against the Board of Adjustment. Because the Court disposes of all claims against the City of Iowa City pursuant to the Defendant's Motion for Summary Judgment, as fully set forth below, the Court denies this motion.

D. Defendant's Motion for Summary Judgment

"Summary judgment is appropriate if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." Kolarik v. Cory Intern. Corp., 721 N.W.2d 159, 162 (Iowa 2006) (citing Iowa Rule of Civil Procedure 1.981(3)). "Further considerations when reviewing a motion for summary judgment are summarized as follows:

> 'A factual issue is material only if the dispute is over facts that might affect the outcome of the suit. The burden is on the party moving for summary judgment to prove the facts are undisputed. In ruling on a summary judgment motion, the court must look at the facts in a light most favorable to the party resisting the motion. The court must also consider on behalf of the nonmoving party every legitimate inference that can be reasonably deduced from the record.'"

Id. (citing Estate of Harris v. Papa John's Pizza, 679 N.W.2d 673, 677 (Iowa 2004) (quoting Phillips v. Covenant Clinic, 625 N.W.2d 714-717-18 (Iowa 2001)).

"To obtain a grant of summary judgment on some issue in an action, the moving party must affirmatively establish the existence of undisputed facts entitling that party to a particular result under controlling law." McVey v. National Organization Service, Inc., 719 N.W.2d 801, 802 (Iowa 2006). "To affirmatively establish uncontroverted facts that are legally controlling as to the outcome of the case, the moving party may rely on admissions in the pleadings...affidavits, depositions, answers to interrogatories by the nonmoving party, and admissions on file." Id. "Except as it may carry with it express stipulations concerning the anticipated summary judgment ruling, a statement of uncontroverted facts by the moving party made in compliance with rule 1.981(8) does not constitute a part of the record from which the absence of genuine issues of material fact may be determined." Id. at 803. "The statement required by rule 1.981(8) is intended to be a mere summary of the moving party's factual

allegations that must rise or fall on the actual contents of the pleadings, depositions, answers to interrogatories, and admissions on file together with any affidavits." Id. "If those matters do not reveal the absence of genuine factual issues, the motion for summary judgment must be denied." Id.

"When two legitimate, conflicting inferences are present at the time of ruling upon the summary judgment motion, the court should rule in favor of the nonmoving party." Eggiman v. Self-Insured Services Co., 718 N.W.2d 754, 763 (Iowa 2006) (citing Daboll v. Hoden, 222 N.W.2d 727, 733 (Iowa 1974) ("If reasonable minds could draw different inferences and reach different conclusions from the facts, even though undisputed, the issue must be reserved for trial.").

"However, to successfully resist a motion for summary judgment, the resisting party must set forth specific evidentiary facts showing the existence of a genuine issue of material fact." Matter of Estate of Henrich, 389 N.W.2d 78, 80 (Iowa App. 1986). "[The resisting party] cannot rest on the mere allegations or denials of the pleadings." Id.

"Certiorari is an 'extraordinary remedy.'" Wallace v. Des Moines Independent Comm. Sch. Dist., 754 N.W.2d 854, 857 (Iowa 2008) (citing Hohl v. Bd. of Educ., 94 N.W.2d 787, 791 (1959)). "It 'is the method for bringing the record of an inferior tribunal before the court for the purpose of ascertaining whether the inferior tribunal or body had jurisdiction and whether its proceedings were authorized.'" Id. (citing Hohl, 94 N.W.2d at 791).

"Illegality exists when the court's factual findings lack substantial evidentiary support, or when the court has not properly applied the law." Christensen v. Iowa District Court for Polk County, 578 N.W.2d 675, 678 (Iowa 1998).

Iowa Rule of Civil Procedure 1.1101 provides:

> Courts of record within their respective jurisdictions shall declare rights, status, and other legal relations whether or not further relief is or could be claimed. It shall be no objection that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form or effect, and such declarations shall have the force and effect of a final decree. The existence of another remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The enumeration in rules 1.1102, 1.1103, and 1.1104, does not limit or restrict the exercise of this general power.

I.R.Civ.P. 1.1101.

"The purpose of a declaratory judgment is to determine rights in advance." Bormann v. Board of Sup'rs in and for Kossuth County, 584 N.W.2d 309, 312 (Iowa 1998). "The essential difference between such an action and the usual action is that no actual wrong need have been committed or loss incurred to sustain declaratory judgment relief." Id. at 312-13. "But there must be no uncertainty that the loss will occur or that the right asserted will be invaded." Id. "As with a writ of certiorari, the fact that the plaintiff has another adequate remedy does not preclude declaratory judgment relief where it is appropriate." Id.

"[D]eclaratory judgment is an action in which a court declares the rights, duties, status, or other legal relationships of the parties." Dubuque Policeman's Protective Ass'n v. City of Dubuque, 553 N.W.2d 603, 606 (Iowa 1996). "Declaratory judgments are res judicata and binding on the parties." Id. "'The distinctive characteristic of a declaratory judgment is that the declaration stands by itself, that is, no executory process follows as of course. In other words such a judgment does not involve executory or coercive relief.'" Id. (citing 22A Am.Jur.2d Declaratory Judgments § 1, at 670 (1988)).

"The burden of proof in a declaratory judgment action is the same as in an ordinary action at law or equity." Owens v. Brownlie, 610 N.W.2d 860, 866 (Iowa 2000). "The plaintiff bringing the action has the burden of proof, even if a negative declaration is sought." Id.

Iowa Code § 414.1(1) provides:

> For the purpose of promoting the health, safety, morals, or the general welfare of the community or for the purpose of preserving historically significant areas of the community, any city is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

Iowa Code § 414.1(1) (2015). Further, the "council of the city shall provide for the manner in which the regulations and restrictions and the boundaries of the districts shall be determined, established, and enforced, and from time to time amended, supplemented, or changed." Iowa Code § 414.4 (2013).

The Iowa Supreme Court has held:

> We are of the opinion the governing body of a municipality may amend its zoning ordinances any time it deems circumstances and conditions warrant such action, and such an amendment is valid if the procedural requirements of the statutes are followed and it is not unreasonable or capricious nor inconsistent with the spirit and design of the zoning statute. The burden is upon the plaintiffs attacking the amendment to establish that the acts of the council were arbitrary, unreasonable, unjust and out of keeping with the spirit of the zoning statutes.

Keller v. City of Council Bluffs, 66 N.W.2d 113, 116-17 (Iowa 1954).

"[C]ourts will not substitute their judgment as to wisdom or propriety of action by a city or town council, acting reasonably within the scope of its authorized police power, in the enactment of ordinances establishing or revising municipal zones." Anderson v. City of Cedar Rapids, 168 N.W.2d 739, 742 (Iowa 1969).

In Kempf, the District Court ruled that a) Kempf had vested rights in his development plans, b) that the 1978 rezoning of Kempf's property was void, and that c) the former zoning

designation should be restored. The City appealed this ruling based on three issues: 1) whether Plaintiffs had overcome the strong presumption of validity of the 1978 Zoning Ordinances; 2) whether the trial court's ruling that the rezonings constituted illegal spot zoning was supported by the record; and 3) whether it was appropriate for the court to order that the land be zoned to the prior zoning designation, when that designation had been repealed.

On the question of whether the plaintiffs had overcome the burden of the presumed validity, the Supreme Court ruled that they had. On the question of whether the 1978 rezoning was illegal spot zoning, the Court ruled that it was. On the question of whether it was appropriate for the Court to order that the zoning be returned to a repealed designation, however, the Court ruled that it was not. The Court ruled that the 1978 rezonings:

> may apply to the Kempf property, provided, however, that Kempf shall be permitted to proceed with the development of apartment buildings, as shown by the record in this case, to the extent that such buildings conform to the ordinances in effect prior to the 1978 rezoning, with the exception of the controversial LSRD ordinance, which we hold inapplicable in this situation. *The city shall be enjoined from prohibiting this use of the property by Kempf. Further development or redevelopment of the property beyond that contemplated by Kempf as shown by this record and noted in this opinion, whether carried out by Kempf or future owners, will be subject to the amended ordinances above designated.*

Kempf, at 401 (emphasis added).

On remand, the District Court entered the Supplementary Orders on Remand, which stated that "once a use has been developed or established on any of [the subject property], further development or redevelopment of that property *shall be subject to the zoning ordinances in effect at that time*..." (emphasis added). It further stated that "The City is and shall be enjoined from interfering with development of those properties as herein provided."

"In construing [an] injunction, effect should be given to every word, if possible, to give the injunction as a whole a consistent and reasonable meaning. Effect should also be given to that which is clearly implied as well as that which is expressed. We consider the spirit as well as the letter of the injunction to determine if its intent has been honestly and fairly obeyed." Bear v. Iowa Dist. Ct. for Tama Co., 540 N.W.2d 439, 441 (Iowa 1995)(internal citations omitted).

The Kempf Court acknowledged that zoning restrictions are "'subject to reasonable revisions with changing community conditions and needs as they appear,'" Kempf at 399 (quoting Anderson, 168 N.W.2d at 742 and Keller, 66 N.W.2d at 116).

The Court does not construe Kempf and the Supplementary Orders on Remand to mean that the City was prohibited from rezoning Plaintiffs' properties. Even Plaintiffs acknowledge in their Resistance to the City's Motion for Summary Judgment that "the injunction in the Remand Order does not specifically state that the City may not rezone the Property" (page 3 of the Resistance) and, contrary to the request sought in their declaratory judgment petition, "TSB does

not ask that the City be permanently enjoined from rezoning the Property" (page 5 of the Resistance).

Plaintiffs' request for a declaratory judgment that the City may not alter the zoning of the property violates public policy. The Kempf Court declared that the district court violated the separation of powers between the legislative and judicial branches when it ordered that the land be zoned to a particular designation, adopting the Michigan approach to this issue set forth in Schwartz v. City of Flint, 395 N.W.2d 678, 690 (1986) (zoning is most uniquely suited to legislative function, and uniquely unsuited to the judicial arena).

The Iowa Supreme Court's support for Keller and Anderson continued even after the Kempf ruling. In Neuzil v. City of Iowa City, 451 N.W.2d 159 (Iowa 1990), the Court considered a challenge to an Iowa City rezoning ordinance and cited to Kempf for its conclusion that a downzoning may arise to a taking. It did not interpret Kempf to mean that the Court could enjoin the City from rezoning property. Instead it engaged in a lengthy discussion about a municipality's power to rezone, noting that "zoning is not static" and that "a change in conditions sometimes calls for a change in plans." Neuzil at 164, citing Stone v. City of Wilton, 331 N.W.2d 398, 403 (Iowa 1983).

The only alleged illegality in this case is a violation of the Kempf rulings. Zoning code amendments are valid "if the procedural requirements of the statute are followed and it is not unreasonable or capricious nor inconsistent with the spirit and design of the zoning statute." Smith v. City of Fort Dodge, 160 N.W.2d 492, 495 (Iowa 1968). "If the validity of the legislative classification is fairly debatable, the legislative judgment must be allowed to control." Kasparek v. Johnson County Board of Adjustment, 288 N.W.2d 511, 517 (Iowa 1980).

The Court finds that the City's rezoning did not violate the Kempf rulings. The City had the power to rezone Plaintiffs' property, as delegated to it by the State of Iowa. This conclusion is supported by the plain language of the Kempf rulings. The Supreme Court said the 1978 zoning designations *did* apply to Plaintiffs' properties once Kempf completed his construction plans. The Court ruled in favor of the City on appeal. This conclusion gives effect to the words "as herein provided" in the Supplementary Orders on Remand. Provided therein was a ruling that the City's rezoning ordinance applied to the property, but that the City could not interfere with Kempf developing according to his plans that were permissible under the prior zoning designation until a use was developed or established. The Supplementary Orders on Remand must be read in conformance with the Supreme Court's ruling. This conclusion is consistent with the Iowa Supreme Court's lengthy and consistent treatment of the City's zoning power. To permanently enjoin the City from rezoning would prevent the City from faithfully performing its zoning powers.

The Court further finds that the City acted legally when adopting Ordinance No. 13-4518. This conclusion is supported by substantial evidence contained in the undisputed Return to the Writ. The Return details the Planning and Zoning Commission's consideration of the proposed rezoning and recommendation thereon to the Council. The Council properly set a public hearing on the proposed rezoning, published notice thereof, held the public hearing as scheduled, and took three considerations of the rezoning ordinance, all as required by and in accordance with Iowa Code Chapter 414 and the Iowa City Code of Ordinances.

E. Plaintiffs' Motions for Summary Judgment

The question raised by Plaintiffs in their Petitions is whether the City violated Kempf when it rezoned Plaintiffs' properties. The Court finds that many of Plaintiffs' "undisputed facts" are disputed, but, more significantly, they are not material hereto. The Court need not determine the nature of Kempf's development plans, the veracity of a note written by a City employee on a site plan, or what was shown on such a site plan. As stated in the Court's Order denying Plaintiffs' Motion to Amend, whether Plaintiffs have a vested right in Kempf's plans, the nature of those vested rights, and any alleged illegalities done by the Board of Adjustment are not relevant to the present matters challenging the City's approval of rezoning Ordinance No. 13-4518. In examining the material facts in a light most favorable to the City, the Court finds that Plaintiffs are not entitled to summary judgment as a matter of law. Kempf did not enjoin the City from rezoning Plaintiffs' property, as fully set forth above.

The Court notes that Plaintiffs' Argument No. III in their Brief in Support of their Motion for Summary Judgment asks for declaratory relief regarding whether they may construct apartment buildings, which is the relief sought in their Amended Petition. Because the Court has denied their Motion to Amend, and their Motion to Reconsider, the Court finds that this requested relief is beyond the scope of the matters before the Court.

RULING

IT IS THEREFORE ORDERED that Plaintiffs' Motion to Reconsider is **DENIED**.

IT IS THEREFORE FURTHER ORDERED that Plaintiffs' Motion to Consolidate the above-captioned matters with TSB Holdings, L.L.C. et al. vs. City of Iowa City Board of Adjustment, CVCV076128 is **DENIED**.

IT IS THEREFORE FURTHER ORDERED that Plaintiffs' Motion to Add the City of Iowa City to TSB Holdings, L.L.C. et al. vs. Board of Adjustment for the City of Iowa City, CVCV076128 is **DENIED**.

IT IS THEREFORE FURTHER ORDERED that Defendant's Motion for Summary Judgment on all claims pled in the above-captioned No. EQCV075292 and No. CVCV075457 is **GRANTED**. The Writ is hereby annulled.

IT IS THEREFORE FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment is **DENIED**.

Costs are assessed to Plaintiffs TSB Holdings, L.L.C. and 911 N. Governor, L.L.C.

Clerk to notify.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
EQCV075292	TSB HOLDINGS LLC ET AL VS CITY OF IOWA CITY

So Ordered

Mitchell E. Turner, District Court Judge,
Sixth Judicial District of Iowa

Electronically signed on 2015-06-03 16:30:23 page 13 of 13

TRIAL COURT RULING, APPEAL NO. 16-0988

IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

TSB Holdings, L.L.C. and 911 North Governor, L.L.C.,	)	
Plaintiffs,	)	
	)	**No. CVCV076128**
vs.	)	
	)	**FINDINGS OF FACT, CONCLUSIONS**
Board of Adjustment for The City of Iowa City,	)	**OF LAW, AND JUDGMENT**
Defendant.	)	

Trial took place on January 5 and 6, 2016, on Plaintiffs' Petition for Writ of Certiorari and Petition for Declaratory Judgment. Attorney Charles Meardon appeared for Plaintiffs. Tracy Barkalow appeared at trial as a representative of Plaintiffs. Assistant Iowa City City Attorneys Elizabeth Craig and Sara Greenwood Hektoen appeared for Defendant. At the conclusion of the trial, the Court set a schedule for the parties to submit post-trial briefs. The parties submitted their final briefing on February 8, 2016, at which time the matter was submitted to the undersigned for ruling. Having considered the file, relevant case law, testimony and exhibits admitted at trial, and the written and oral arguments of counsel, the Court hereby enters the following ruling:

PROCEDURAL HISTORY

Plaintiffs TSB Holdings, L.L.C. and 911 N. Governor, L.L.C. filed a Petition for Writ of Certiorari on January 9, 2014. Plaintiffs state that on May 24, 2013, they applied to the Defendant Board of Adjustment for The City of Iowa City to modify the decision of the City of Iowa City's building department that denied a variance for property owned by Plaintiffs. Plaintiffs further state that on December 12, 2013, Defendant denied the variance. Plaintiffs contend the action denying the variance was illegal. In their Petition for Declaratory Judgment, Plaintiffs have requested a declaration from this Court that the property may be developed as permitted by the Iowa Supreme Court in the case of Kempf v. City of Iowa City, 402 N.W.2d 393 (Iowa 1987) and subsequent remand order of the Johnson County District Court, as well as a certiorari finding that Defendant illegally denied Plaintiffs' site plans to build the apartment buildings because the Kempf rulings permit such development regardless of any zoning classification. Plaintiffs claim to be successors to the Mr. Kempf, such that they retain development rights to the subject property. Defendant has denied the allegations of the Petition that are adverse to it.

The facts of Kempf are critical to an understanding of the basis for Plaintiffs' claims in this case, and this Court will cite at length to the findings and conclusions of the Iowa Supreme Court in Kempf to set forth a context for consideration of Plaintiffs' pending claims. In Kempf, Wayne Kempf purchased a four-acre tract in Iowa City. Id. at 395. When he purchased the tract, it was "zoned for office buildings and high density, multi-family residential housing." Id. "Relying on a city study concluding such uses should be expanded in the area, Kempf

substantially improved the tract and constructed an office building and first of five apartment structures." Id. "The city then rezoned the remaining area so that the planned improvement could not be completed." Id.

> At the outset the property involved in this controversy comprised seven unimproved platted lots or parts of lots, zoned R3B, lying between North Dodge Street and North Governor Street in the near north side of Iowa City. In all, the property was approximately four acres in size. We find these lots probably were assigned a R3B intense zoning designation because their rugged and wooded terrain significantly increased the cost of development, making it economically unfeasible to develop them for less intense, relatively low income producing uses like single-family or duplex residential housing.

Id. at 395. Sometime around 1962, the City established a comprehensive plan for the near north side to address the issues of deteriorating houses and low population. Id. The City finalized "The North Side Study" in January, 1968, and stated:

> A "transition area" is proposed between North Governor Street and Dodge Street [to] be established by rezoning this area to R3 (*except for the area that is now zoned R3B*). This could provide an orderly transition from the older established residential areas to the newer areas and would promote the desirability of this area for gradual redevelopment.

Id.

Mr. Kempf relied on the study and the R3B zoning when he bought the property for the purpose of constructing high density residential housing. Id. at 396.

> In the year of purchase Kempf commenced extensive site development. He removed all trees and brush after determining there were no good trees on the premises. Storm sewerage, which had crossed the property in an open ditch, was replaced with a city-inspected storm sewer, including an eighteen-foot-deep catch basin to direct water into the system. Kempf also filled and graded the area, which had a twenty-foot fall and a deep ravine varying from ten to eighteen feet in depth. Water, sanitary sewer, and electricity were brought to the project. In all, Kempf invested a total of approximately $114,500 in land purchase price and preliminary site improvements.
>
> The contemplated apartment construction was temporarily delayed when Kempf successfully bid on a lease to Johnson County of a social services building to be constructed on three of the small lots. This was a permitted R3B zone use. The city granted a building permit. The improvement was commenced in the fall of 1973 and completed in the spring of 1974. In 1985 the social services building had an assessed valuation of $308,738. At the time of this construction water, electricity, sewer, and a storm sewer were extended to proposed locations for various apartment buildings to be constructed under the overall plan.

Id. at 396.

The City issued another study in 1974, which designated Mr. Kempf's lots as zoned R3B. Id. Mr. Kempf began the second phase of development of the property in December 1976, and contracted with Earl Yoder Construction Co. to build a 29-unit apartment building on one of the larger lots. Id. This angered neighboring property owners, and the building permit was revoked, leading to the filing of an action in Johnson County District Court in 1977. Id. at 396-97. In 1978, the City removed the R3B zoning designation from the Kempf tract, and rezoned it into four different designations. Id. at 397-98. "The social services building lots were zoned CO (commercial office use); a portion of another lot was zoned R3A to allow for the twenty-nine unit apartment building; the balance of that lot was zoned R3, allowing multi-family development but requiring 3000 square feet per unit; and the remaining lots were zoned R2, allowing only single-family and duplex development." Id. at 398.

The matter proceeded to trial in 1985. Id. at 398. The Iowa Supreme Court summarized the trial court's findings and conclusions as follows:

> Trial court found the city's action in interrupting construction on the twenty-nine unit apartment building was unreasonable, arbitrary, and capricious and "constituted a tort for which liability is imposed under Chapter 613A of the Code of Iowa." The court found the damages to be in the amount of $7,483.13, and rendered judgment in that amount against the city. The record reflects the judgment has been paid. The city makes no complaint about this facet of the case in this appeal.
>
> Trial court further found the city's spot downzoning of the Kempf tract was arbitrary, capricious, unreasonable, and unrelated to interests of public health, safety, welfare, or morals. The court further found it was not required to determine whether the zoning change was an unconstitutional "taking" because it was restoring the tract to its former R3B zoning classification. The "taking" issue, however, was reserved for future resolution in the event the city refused to issue building permits in accordance with the provisions of the prior zoning ordinance, which classified this property as R3B.

Id.

The City appealed. The Court found that "overwhelming evidence discloses the lots in the remaining 2.12 acres of the Kempf tract cannot be improved with any development that would be economically feasible." Id. at 400. "For this reason we find that application of the downzoning ordinance to the lots in the 2.12 acres would be unreasonable." Id. The Court ruled that the 1978 rezonings:

> may apply to the Kempf property, provided, however, that Kempf shall be permitted to proceed with the development of apartment buildings, as shown by the record in this case, to the extent that such buildings conform to the ordinances in effect prior to the 1978 rezoning, with the exception of the controversial LSRD ordinance, which we hold inapplicable in this situation. The city shall be enjoined from prohibiting this use of the property by Kempf. Further development or redevelopment of the property beyond that contemplated by Kempf as shown by this record and noted in this opinion, whether carried out by Kempf or future owners, will be subject to the amended ordinances above designated.

Id. at 401.

On remand, the District Court entered Supplementary Orders on Remand, which stated that the "owner or owners of said properties, and their successors and assigns, shall be permitted to develop these properties with multiple dwellings (apartments) in accordance with the provisions applicable to the R3B zone in effect on May 30, 1978," and "once a use has been developed or established on any of [the subject property], further development or redevelopment of that property shall be subject to the zoning ordinances in effect at that time...." Exhibit 1, p. 59. It further stated that "The City is and shall be enjoined from interfering with development of those properties as herein provided." Id. The District Court's Supplementary Orders on Remand specifically described Lots 10, 49, and 51, and part of Lot 50, on the subject property. Exhibit 1, pp. 58-59. It is of note that the injunctive language from the Supplementary Orders on Remand has not been dissolved or modified.

FINDINGS OF FACT

Tracy Barkalow is an Iowa City licensed real estate agent and investor who owns the two Plaintiffs named in this action, TSB Holdings, L.L.C. and 911 North Governor, L.L.C. Mr. Barkalow also owns other legal entities that hold property, and owns over 100 rental units in the Iowa City area. Mr. Barkalow is a lifelong resident of Iowa City, and has been in the real estate business since 1992, when he went to work for his uncle, Gerry Ambrose, a prominent real estate professional in the area. Mr. Barkalow advises clients regarding the purchase of investment properties and represents them as a real estate broker at meetings with the City at which site plans are submitted.

Plaintiffs own properties in Iowa City, including the property at issue in this case (also referred to as "the property" for the purposes of this Ruling). The property at issue in this case is shown in Plaintiffs' Exhibit 3. Specifically, TSB Holdings owns properties at 902 and 906 North Dodge Street in Iowa City, which is shown as Lots 49, 50 and 51 in Exhibit 3. TSB Holdings acquired Lots 49, 50 and 51 in the spring of 2009 for the price of $3,400,000.00. Exhibit G1. The property was acquired from an entity known as Iowa-Illinois Square, LLC. Exhibit G1. Iowa-Illinois Square, LLC is an LLC owned by the Clark family, to whom some members of which Mr. Barkalow is related, and which owns many investment properties in the Iowa City area. Jeffrey Clark estimates that Clark family corporate entities own around 50 multi-family buildings in Iowa City. Mr. Clark also is part of about 15 LLCs, which own the properties.

Main Street Partners purchased the property from AB Investments, L.L.C. sometime in 2005, for $2,414,000.00. Exhibit G1; testimony of Jeffrey Clark. Iowa-Illinois Square, LLC, or one of its corporate predecessors, Main Street Partners, owned 902 and 906 North Dodge since August, 2005. Exhibit G1. Ken Albrecht was part of AB Investments, and was one of Mr. Kempf's partners. TSB Holdings purchased the property from Iowa-Illinois Square, L.L.C. in 2009 for approximately $3,400,000.00. Exhibit G1. TSB Holdings did not purchase 902 and 906 North Dodge directly from Mr. Kempf or Mr. Albrecht, nor from any corporate entity of Mr. Kempf or Mr. Albrecht. While one of the previous corporate owners of 902 and 906 North Dodge did some work on the existing apartment buildings around the time TSB Holdings

purchased 902 and 906 North Dodge, the only new construction TSB Holdings was aware of having occurred on 902 and 906 North Dodge took place in 1989 or 1990, which is when Mr. Kempf built a 12 unit structure at 906 North Dodge. Mr. Clark recalls that he believed the zoning to permit higher density than normally was allowed in that area, and he believed that the Kempf orders, along with the zoning designation, would permit TSB Holdings to build the apartment buildings on the property. There is no clear explanation as to why TSB Holdings purchased the property for $1,000,000.00 more than it had sold for in 2005.

There are 29 apartment units at 902 North Dodge and 12 apartment units at 906 North Dodge, and the apartment units are on Lot 50. 911 North Governor, L.L.C. also owns properties at 902 and 906 North Dodge, which is shown as Lots 8, 9 and 10 in Exhibit 3. Lots 8 and 9 include a building that has been utilized by the Department of Human Services. Mr. Barkalow became the owner of an interest in 911 North Governor in the spring of 2013. Mr. Barkalow bought the entirety of the aforementioned properties and legal entities for the purpose of utilizing apartments that existed on the property at the time it was purchased by Mr. Barkalow, as well as to build more apartments on the property.

The existing buildings at 902 and 906 North Dodge Street were built by Wayne Kempf and his partners in 1974. Exhibit B is an aerial view of the area in question. There is a concrete surface lot on Lots 9, 10, 49 and on part of Lot 50, and the parking area is connected to the street. Exhibit B. The parking area is in closest proximity to the former DHS building located at the 911 North Governor Street address. Exhibit B. Title opinions for the property do not mention the Kempf litigation. Exhibits F1, F2, F3 and F4. The parties to this case stipulated, at trial, to the fact that at the time of the Kempf trial, the only apartment building in existence was the 29-unit building and there were no plans submitted to the City between the time of the Kempf trial and the construction of the 29-unit building. The parties also stipulated that Lots 8 and 9, and part of Lot 50, are not subject to the Kempf remand order. It was Mr. Kempf's testimony, in the Kempf proceedings, that neither he nor Mr. Albrecht consulted with any local engineering firms in Iowa City to find out what kind of development could be done on the property. Exhibit N, pp. 106-07. The only development Mr. Kempf built after the Kempf remand order was the 12-unit building at 906 North Dodge. However, there may have been a moratorium in place prohibiting construction of apartment buildings at the time of the Kempf trial. Exhibit N, p. 107.

On November 13, 2012, the City amended its comprehensive plan to designate properties located in the area, including the property at issue in this case, as single family and duplex residential properties. Exhibit 1, p. 14. Also in 2012, and possibly overlapping with the time the City was in the process of amending its comprehensive plan, Mr. Barkalow started discussions with the City of Iowa City regarding development of the property. Mr. Barkalow also had objected to the change in the comprehensive plan because he believed that the Kempf decision applied to the property. On September 19, 2012, Attorney Joseph Holland, acting for Three Guys Holdings, which then owned the property at 911 North Governor Street, sent a letter to the City of Iowa City Planning and Zoning Commission. Exhibit 7. Three Guys Holdings is owned by members of the Clark family, and Attorney Holland wrote the letter to set forth Three Guys Holdings' objection to not being permitted to build on the property as it wished, and in accordance with Kempf. Exhibit 7. Mr. Barkalow takes issue with the representation in the

letter that Three Guys Holdings had any interest in the 902 and 906 North Dodge properties. Mr. Barkalow did not review the letter before it was sent by Attorney Holland.

Mr. Barkalow did not have an interest in the 911 North Governor Street property at this time, but the Clark family, through a corporate entity, purchased the 911 North Governor Street property sometime in 2012 for about $200,000.00. At the time the Clark family corporate entity purchased 911 North Governor Street, it consisted of Lots 8, 9 and 10. Mr. Clark testified that Mr. Albrecht was a member of the corporate entity that purchased 911 North Governor Street, and the building located at 911 North Governor Street and the parking area around it were built by Mr. Albrecht and Mr. Kempf.

911 North Governor, L.L.C. purchased the property located at 911 North Governor Street from AB Investments, L.L.C. on March 27, 2012. Exhibit G2. According to Mr. Clark, the purchase price for 911 North Governor Street by 911 North Governor, L.L.C. was also in the range of $200,000. Mr. Barkalow acquired his interest in 911 North Governor, L.L.C. in 2013. Mr. Barkalow testified that TSB Holdings was interested in acquiring an interest in the 911 North Governor Street property because TSB Holdings would need access through 911 North Governor Street to get to the other properties TSB Holdings owned, and to complete the Kempf plan. It was TSB Holdings' intent to demolish, remove or reconfigure the DHS building and the parking area currently on lots 10, 49 and 50 if its plan was approved. Exhibits A1 and A2. Plaintiffs believe this was appropriate pursuant to Kempf.

On January 10, 2013, TSB Holdings submitted a site plan to the City for a 30-unit apartment complex to be built on the property. Exhibit 6. The site plan was prepared by MMS Consultants, Inc., with whom Mr. Barkalow and his brother-in-law, Jeff Clark, worked in compiling the plans for the property. There are handwritten notes on the site plan from Julie Tallman, who reviews site plans for the City. Exhibit 6. Ms. Tallman's role in reviewing site plans is to determine if the site plan includes enough information for staff to conduct the review; distribute the plan to other staff; and conduct her own review against the zoning ordinance. Included among Ms. Tallman's responsibilities are evaluating things such as required parking for a site plan, making sure the plan complies with ordinances, and addressing technical defects with the plan.

Ms. Tallman's notes on the site plan at issue in this case include notations of "R3B" and "1987" on Lots 10, 49, 50 and 51. Exhibit 6. The legal descriptions of the property as set forth in the Johnson County District Court's "Supplementary Orders on Remand" are the same as the areas where the "R3B" and "1987" notations appear on Exhibit 6. Exhibit 1, pp. 58-59; Exhibit 6. Ms. Tallman considered the site plan as it relates to the Kempf case, including whether the Kempf decision even applies to the project. Exhibit 1, p. 116. Ms. Tallman's notations of "R3B" and "1987" are related to the zoning areas that Ms. Tallman believed applied to the property. Ms. Tallman also made notations regarding whether there were services to the property, such as water and water services, that would be abandoned as a result of the project, since the City wants to be sure that a new building will have electrical and utility services and sanitary and storm water lines. Exhibit 6. Rezoning is not required to abandon a utility line, to move a sewer line, or to move a storm water line. Based on Plaintiffs' site plan, Ms. Tallman

had concerns about there being multiple zoning designations on one tract in the property, and she testified that in such a situation, the most restrictive zoning designation applies.

The current electrical easement on the property, held by MidAmerican Energy, is shown on Exhibit A3, as marked in pink highlighting by Mr. Barkalow at the time of trial. See also Exhibit I. The parties agree the easement runs through Lots 49 and 50. The electrical easement is signed by Mr. Albrecht and Mr. Kempf, and was granted to MidAmerican Energy Company's predecessor in interest in 1990. Exhibit I. The City is not a party to the easement. Exhibit I. Plaintiffs propose the easement be relocated, as shown in Exhibit A3 in yellow highlighting, as marked by Mr. Barkalow at the time of trial. Mr. Barkalow testified it would not be onerous to move the easement, while Ms. Tallman testified that it could be a difficult process but usually was not. Ms. Tallman also testified that as long as two private parties agreed that an electrical line could be moved, the City would not care if the parties reached that agreement, as long as there is electrical service provided to the property and no other problems are created. The site plan also contemplated relocation of a storm sewer. Exhibit A3 (highlighted in yellow by Mr. Barkalow at the time of trial). MMS Consultants developed the proposal to relocate the storm sewer because of the topography of the land. According to Ms. Tallman, moving an easement, relocating a sewer line, and relocating storm sewer lines does not constitute a change in use of the property. However, if there is an actual change in use of the property, such as from single-family dwelling units to multi-family dwelling units, the City considers that a change in land use. Ms. Tallman testified that a use is not a zoning classification. Ms. Tallman also testified that there has been no construction activity on the property since the early 1990s, and no movement of sewer lines since probably the 1980s.

Duane Musser is a landscape architect with MMS Consultants, and Mr. Musser prepared the site plans for the development of the property at issue in this case. Mr. Musser submitted the plan based on his understanding of the Kempf case. Mr. Musser placed the buildings where he did in the site plans because of the language in the Kempf remand order. Mr. Musser believes the sanitary and sewer lines are in the same place on the property that they were in 1985, and he believes the electrical line was put in after 1985.

According to Mr. Barkalow, when a site plan is submitted to the City for review, the typical procedure is for there to be a back and forth between the developer and the City in order for both sides to determine the issues presented by the plan, so that the issues can be addressed and the project can move forward. In this particular case, Mr. Barkalow met with Ms. Tallman and they discussed the notations she placed on the site plan. Ms. Tallman then prepared a "Site Plan Review Checklist" that analyzed the 30-unit plan. Exhibit 1, p. 115-116. Ms. Tallman considered the impact of the Kempf case on the site plan. Exhibit 1, p. 116. After Ms. Tallman made her findings in the Checklist, TSB Holdings submitted an amended site plan. Exhibit 5. The amended site plan proposed placing three buildings on the property instead of one, and put the buildings on Lots 10, 49 and 51. Exhibit 5. Mr. Barkalow dropped the plans off at City Hall, but had no discussions with anyone about the amended site plan. As part of his submissions, Mr. Barkalow believed that a 1988 site plan from Mr. Kempf for the property had been submitted to the City for approval. Exhibit 1, p. 72.

Ms. Tallman, acting on behalf of the City, denied the amended site plan on February 7, 2013, stating:

> The reason for denial is that multi-family dwellings are not allowed in either the existing zoning or the proposed zoning. The existing CO-1 zone does not allow multi-family dwellings unless they are above a commercial use. The proposed RS-12 zone does not allow multi-family dwellings.

Exhibit 1, p. 16. Ms. Tallman issued another denial on April 29, 2013. Exhibit 1, p. 20. The basis for the denials was that the plans did not comply with the zoning that the City believed applied to the property. Ms. Tallman acknowledged that there was not much give and take during this process because once the City determined that the buildings themselves violated the zoning code, the analysis ended.

Jann Ream is a Code Enforcement Specialist in the Building Division of the City of Iowa City. As part of her job, she does inspections and enforcement for zoning violations. Ms. Ream testified that, in 1989, a building permit was applied for and issued for the construction of a 12-unit apartment building at 906 North Dodge Street, and all subsequent permits issued for that building were for repairs and restoration to the existing buildings on the property. The next site plans submitted for 906 North Dodge were those from TSB Holdings. Ms. Ream also testified that, for the properties located at 911 North Governor Street, the permit history also was simply for repairs and restoration to existing buildings on the property. Ms. Ream did not review any site plans that were submitted by Mr. Barkalow for this property.

Karen Howard is a City Planner for the City of Iowa City. As part of her employment, Ms. Howard has been a district planning coordinator in charge of developing district plans that were extensions of the comprehensive plan for the City. The City's comprehensive plan is an overall vision for the growth of the City. Each of the ten districts within the City is addressed within the comprehensive plan due to the different character, challenges and opportunities presented by each district. The zoning code is the City's means of implementing the comprehensive plan. According to Ms. Howard, the property at issue in this matter is part of the central planning district, the plan for which was adopted in 2008. Exhibit D. The 2008 plan was the first detailed plan for this area of the City. Prior to adopting the 2008 plan, community outreach took place in the form of workshops and other meetings. Public hearings also were held before the 2008 plan was adopted. Ms. Howard testified that the meetings and hearings related to this particular plan were well attended, and specific concerns regarding this area included neighborhood stabilization, transportation/traffic, and commercial development. The future land uses for the property at issue in this matter are low to medium density multi-family housing and open space. Exhibit D.

Ms. Howard testified that there no longer is R3B zoning in the City, and all previous properties that were zoned R3B have been rezoned to a current valid zoning designation. The R3B zoning designation allowed the highest density multi-family housing units, as well as anything smaller in size. There is no comparable provision in the current zoning code. A new zoning code was adopted in 2005, which set new standards for location of buildings in relation to parking and to the street; for parking lots for multi-family buildings; and pedestrian standards,

among other things. Ms. Howard was involved with the rezoning of the specific properties at issue in this case in 2013, and the properties were rezoned to bring them into compliance with the recent change to the comprehensive plan. The new code designates the area as RS12, and primarily allows single family, duplex and townhouses, but multi-family units are not allowed.

Plaintiffs appealed the denial of the site plans to the Defendant Board. The basis for the appeal was Plaintiffs' allegation that the buildings proposed could be constructed under Kempf, and that the City had not properly considered Kempf in denying the site plans. Exhibit 1, pp. 23-25. The Board denied the appeal, finding that the zoning applicable to the property precluded Plaintiffs from developing the property as proposed in their site plans. Exhibit 1, pp. 199-200. This action followed, and Plaintiffs are requesting this Court find that they be permitted to develop the property pursuant to Kempf.

POST-TRIAL ARGUMENTS OF THE PARTIES

Plaintiffs' Post-Trial Arguments

Plaintiffs argue that TSB Holdings is a "future owner" or "owner or owners and their successors and assigns" within the meaning of Kempf and the remand order. Plaintiffs also argue that a "use" has not been "developed or established" on the relevant parts of the property as contemplated by Kempf or the remand order. Plaintiffs contend Defendant acted illegally in denying TSB Holdings' site plan without considering Kempf and the remand order. Finally, Plaintiffs assert their request for declaratory relief does not violate public policy.

Defendant replies that Kempf placed limits on the development rights for the property, and TSB Holdings is not a successor to the development rights the Iowa Supreme Court granted to Mr. Kempf. Defendant claims a use has been established and developed on the property since at least 1990. Defendant argues that if the Court determines that Kempf no longer insulates Plaintiffs' property from city zoning, then Defendant's application of current zoning was legal. Finally, Defendant asserts that Plaintiffs' interpretation of the Kempf orders violates public policy.

Defendant's Post-Trial Arguments

Defendant argues that Plaintiffs' request for declaratory relief should be denied because Plaintiffs are not successors to Mr. Kempf's development rights, and a use has been established for the property. Defendant contends Plaintiffs seek to further develop or redevelop the property, and Plaintiffs' plans are not what Mr. Kempf contemplated. Finally, Defendant claims that Plaintiffs' requested declaratory relief violates public policy by indefinitely prohibiting the City from enforcing valid zoning of the property, regardless of the passage of time or changes in the community.

Plaintiffs reply that a "use," as contemplated by the Kempf rulings, has not been "developed or established" on the relevant parts of the property. Plaintiffs claim TSB Holdings retains the ability to develop the property under the Kempf orders; the ability to construct apartments under Kempf is not personal to Kempf; and TSB Holdings is a "successor in interest"

under the remand order. Plaintiffs claim TSB Holdings attempted to comply with Kempf, and TSB Holdings seeks to complete the apartment plan contemplated by the Kempf orders. Finally, Plaintiffs contend that public policy considerations do not mandate ignoring court orders, as the City has the remedy of moving to modify or dissolve the injunction entered on remand.

CONCLUSIONS OF LAW

Standards Applicable to Certiorari Actions

Iowa Rule of Civil Procedure 1.1401 provides:

> A writ of certiorari shall only be granted when specifically authorized by statute; or where an inferior tribunal, board or officer, exercising judicial functions, is alleged to have exceeded proper jurisdiction or otherwise acted illegally.

I.R.Civ.P. 1.1401.

"Certiorari is an 'extraordinary remedy.'" Wallace v. Des Moines Independent Comm. Sch. Dist., 754 N.W.2d 854, 857 (Iowa 2008) (citing Hohl v. Bd. of Educ., 94 N.W.2d 787, 791 (1959)). "It 'is the method for bringing the record of an inferior tribunal before the court for the purpose of ascertaining whether the inferior tribunal or body had jurisdiction and whether its proceedings were authorized.'" Id. (citing Hohl, 94 N.W.2d at 791).

"Illegality exists when the court's factual findings lack substantial evidentiary support, or when the court has not properly applied the law." Christensen v. Iowa District Court for Polk County, 578 N.W.2d 675, 678 (Iowa 1998).

"Evidence is substantial 'when a reasonable mind could accept it as adequate to reach the same findings.'" City of Cedar Rapids v. Municipal Fire and Police Retirement System of Iowa, 526 N.W.2d 284, 287 (Iowa 1995) (citing Norland v. Iowa Dep't of Job Serv., 412 N.W.2d 904, 913 (Iowa 1987)). "Evidence is still substantial even though it would have supported contrary inferences." Id.

Standards Applicable to Declaratory Judgment Actions

Iowa Rule of Civil Procedure 1.1101 provides:

> Courts of record within their respective jurisdictions shall declare rights, status, and other legal relations whether or not further relief is or could be claimed. It shall be no objection that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form or effect, and such declarations shall have the force and effect of a final decree. The existence of another remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The enumeration in rules 1.1102, 1.1103, and 1.1104, does not limit or restrict the exercise of this general power.

I.R.Civ.P. 1.1101 (2009).

"The purpose of a declaratory judgment is to determine rights in advance." Bormann v. Board of Sup'rs in and for Kossuth County, 584 N.W.2d 309, 312 (Iowa 1998). "The essential difference between such an action and the usual action is that no actual wrong need have been committed or loss incurred to sustain declaratory judgment relief." Id. at 312-13. "But there must be no uncertainty that the loss will occur or that the right asserted will be invaded." Id. "As with a writ of certiorari, the fact that the plaintiff has another adequate remedy does not preclude declaratory judgment relief where it is appropriate." Id.

"[D]eclaratory judgment is an action in which a court declares the rights, duties, status, or other legal relationships of the parties." Dubuque Policeman's Protective Ass'n v. City of Dubuque, 553 N.W.2d 603, 606 (Iowa 1996). "Declaratory judgments are res judicata and binding on the parties." Id. "'The distinctive characteristic of a declaratory judgment is that the declaration stands by itself, that is, no executory process follows as of course. In other words such a judgment does not involve executory or coercive relief.'" Id. (citing 22A Am.Jur.2d Declaratory Judgments § 1, at 670 (1988)).

"The burden of proof in a declaratory judgment action is the same as in an ordinary action at law or equity." Owens v. Brownlie, 610 N.W.2d 860, 866 (Iowa 2000). "The plaintiff bringing the action has the burden of proof, even if a negative declaration is sought." Id.

Analysis of the Parties' Arguments

With the previously stated legal standards in mind, the Court turns to a consideration of the parties' legal arguments. The Court first considers whether TSB Holdings is a "future owner" or "owner or owners and their successors and assigns" within the meaning of Kempf and the remand order. In addressing this issue, the Court initially looks to the language of the Kempf orders for guidance as to the applicability of the orders to Plaintiffs' claims in this case. "A court decree is construed like any other written instrument." Waters v. State, 784 N.W.2d 24, 29 (Iowa 2010). "The determinative factor in construing a court decree is the intent of the court, which is derived from all parts of the judgment." Id. "We strive to construe a judgment consistent with the language used in the judgment." Id. "If the meaning of the decree is ambiguous, we resort to the pleadings and other proceedings to clarify the ambiguity." Id. "In the end, we seek to give effect to those matters that are implied as well as express." Id.

It is this Court's belief that the ruling by the Iowa Supreme Court in Kempf was personal to Mr. Kempf, such that Plaintiffs are not "future owners" of the property who are entitled to assert Mr. Kempf's development rights in the property. The facts in Kempf were exclusive to the actions Mr. Kempf took on the subject property, and the Iowa Supreme Court's ruling was that Kempf would be permitted to proceed with development of apartment buildings, with the City being enjoined from prohibiting this use of the property by Kempf. Kempf, 402 N.W.2d at 401. Further development, whether carried out by Kempf or future owners, was to be subject to the amended ordinances. Id. The Court agrees with Defendant's statement that the purpose of the right granted to Mr. Kempf to develop apartment buildings "at a density in contradiction with the zoning code...was to allow Kempf the opportunity to realize his investment-backed expectations by completing his development plan." See Defendant's Post-Trial Brief, p. 16. The

Iowa Supreme Court specifically considered the investments Mr. Kempf made in the subject property in reaching its decision. Kempf, 402 N.W.2d at 396. The Iowa Supreme Court also considered implications of the economic feasibility of developing the property. Id. at 400. It was Mr. Kempf who was specifically allowed to develop apartment buildings. Id. at 401.

The difficulty, however, lies in the fact that the Johnson County District Court, on remand, added language regarding the successors and assigns of the owner or owners of the properties. Exhibit 1, p. 59. While it would have been helpful if a party to the Kempf remand proceedings would have moved for reconsideration of the remand order to seek inclusion of language therein that more appropriately complied with the Iowa Supreme Court's Kempf opinion, no party did so. It may be prudent for the City to move to have the injunction dissolved, but no such request is before the Court at this time. Therefore, while the Court believes that the plain language Iowa Supreme Court's Kempf ruling establishes that the development rights extended to Mr. Kempf in that case do not extend to Plaintiffs, the remand order does apply in this instance. The Court finds it necessary to more thoroughly analyze the question of whether Plaintiffs are successors and assigns who are entitled to Mr. Kempf's development rights in the property.

With respect to defining the word "assigns," the Iowa Supreme Court has held:

> It is a term of well-known meaning. We may assume that the parties knew that meaning. It does not mean just a single person, but also comprehends a line or succession of persons. It is often written "assignees." An "assignment" has been defined as "a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein." (1 Bouvier's Law Dict., Rawles Third Rev., p. 260.) A frequently quoted definition of the word "assigns" is that stated in Bailey v. DeCrespigny, 4 Court of Queens Bench, Law Reports, 178, 185, where the court said: "The word 'assigns' is a term of well-known signification, *comprehending all those who take immediately or remotely from or under the assignor, whether by conveyance, devise, descent, or act of law;* Spencer's Case, 5 Rep. 16.

Reichard v. Chicago, B. & Q.R. Co., 1 N.W.2d 721, 733 (Iowa 1942).

However, with respect to the definition of the word "successor," the Iowa Supreme Court has held:

> According to one court,
>
> > [t]he exact meaning of the word "successor" as applied to a contract must depend largely on the kind and character of the contract, its purposes and circumstances, and the context. As applied to corporations, "successor" does not ordinarily mean an assignee, but is normally used in respect to corporate entities, including corporations becoming invested with the rights and assuming the burdens of another corporation by amalgamation, consolidation, or duly authorized legal succession. *The term "**successor**" has also been **defined** as "one who takes the place that another has left, and sustains the like part or character."*

> Enchanted Estates Comm. Assoc. v. Timberlake Improvement Dist., 832 S.W.2d 800, 802 (Tex.Ct.App.1992) (citations omitted) (emphasis added)

Sun Valley Iowa Lake Ass'n v. Anderson, 551 N.W.2d 621, 640 (Iowa 1996).

Under the facts of the case at bar, there was no transfer of rights from Mr. Kempf directly to TSB Holdings for the purpose of development of the property. Rather, the transfer from Mr. Kempf was to one of the Clark entities, who did not intend to construct an apartment building on the property. Further, any successor interest in the property was not the same as the interest Mr. Kempf held in the property because the properties were not sold as one tract, which is how Mr. Kempf purchased the property and considered his development of the property. The Court agrees with Defendant's statement that "Kempf fulfilled his plans and any special development rights that existed under the rulings ceased before he sold the properties." See Defendant's Post-Trial Brief, p. 16. Plaintiffs did not take the place that was left by Mr. Kempf, and did not sustain the like part or character of Mr. Kempf's interest in the property. See Sun Valley, 551 N.W.2d at 640. Therefore, the Court finds that neither Plaintiff qualifies as successor to Mr. Kempf's development rights, and Plaintiffs must comply with the current zoning code in their development of the property.

The Court turns to the issue of whether a use has been developed or established on the relevant parts of the property, as contemplated by the Kempf orders. This issue is a close call. As Plaintiffs point out, the Kempf remand order found that once a use had been developed or established on any part of the properties considered in that case, any further development or redevelopment of the property would be subject to the zoning ordinances in effect at the time of the further development or redevelopment. Exhibit 1, p. 59. However, under the facts of this case, Kempf and his partners did take steps to complete the plans for the proposed building and establish a use of the properties. The building at 902 North Dodge was constructed in 1989, and the easement was given to MidAmerican Energy Company in 1990. The buildings and parking lots on the property were used by Kempf and his partners throughout this time, and the property later was sold. Kempf and his partners did not sell the property in the four-acre tract, but rather sold it off in smaller sections. No site plan was submitted to the City after 1989, until TSB Holdings submitted its site plans in 2013. While these actions certainly do not rise to the level of an extensive use and development of the property by Kempf and his partners, they nonetheless establish that there was a use developed or established on the property by Mr. Kempf.

Further, Plaintiffs proposed plans for the property would amount to development or redevelopment of the property. The site plans show that Plaintiffs would demolish the DHS building and the parking area around the DHS building on Lots 9, 10, 49 and 50. Utility lines also would have to be relocated, and Plaintiffs would have to reach an agreement with MidAmerican Energy for renegotiation of the easement. This is a different use of the property than what Mr. Kempf had planned, and constitutes further development or redevelopment. This further development or redevelopment subjects Plaintiffs' use of the property to the current zoning of the property.

The Court turns to the public policy considerations that impact this matter. Defendant's assertion is that Plaintiff's requested relief violates public policy by indefinitely prohibiting the City from enforcing valid zoning of the property. This is, perhaps, Defendant's strongest argument in support of its assertion that Plaintiffs' claims must be denied.

Iowa Code § 414.1 provides that a city is "empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes." Iowa Code § 414.1 (2015). "The governing body of a city, the council, may amend its zoning ordinances at any time it deems circumstances justify such action, and such an amendment is valid if statutory procedural requirements are followed, and the amendment is not unreasonable or capricious, nor inconsistent with the spirit of the zoning statute." Kane v. City Council of City of Cedar Rapids, 537 N.W.2d 718, 721 (Iowa 1995). "There is a strong presumption of legality when reviewing city zoning ordinances, and if the validity of the classification for zoning purposes is fairly debatable, the council's judgment must be allowed to control." Id. "[C]ourts reviewing zoning amendments should not substitute their judgment as to the wisdom or propriety of the municipality's action when the reasonableness of the amendments is fairly debatable." Neuzil v. City of Iowa City, 451 N.W.2d 159, 166 (Iowa 1990).

Following periods of time for public education and comment, the City has adopted new zoning regulations and a new Comprehensive Plan since Mr. Kempf had his interest in this property. These are actions that the City clearly is empowered to take pursuant to Iowa Code § 414.1. There is little doubt that the City has changed in the nearly thirty years since Mr. Kempf last was involved with the property, and there have been challenges to regulating standards applicable to the various neighborhoods in the City. The City utilized its zoning powers to determine that the particular challenges faced in the area in which the property at issue in this case is situated necessitate zoning for single-family and duplex residential uses. The considerations given to neighborhood stabilization, transportation/traffic, and commercial development for this particular area are decisions the City has the power to make, and are given a strong presumption of legality, in spite of the fact that the Johnson County District Court utilized injunctive language in its remand order regarding this property. To permit Plaintiffs to construct their proposed building on the property at this time would create an unworkable situation when it comes to how the rest of the neighborhood is zoned, and would be against public policy interests that exist with respect to a City's right to amend zoning ordinances when circumstances justify such action. The circumstances justifying the City's right to such action were outlined most demonstrably by Ms. Howard's testimony.

Based on these findings and conclusions, the Court finds, specifically, as to each assertion that Plaintiffs have made in this case, that TSB Holdings is not a "future owner" or "owner or owners and their successors and assigns" within the meaning of Kempf and the remand order. A "use" has been "developed or established" on the relevant parts of the property as contemplated by Kempf and the remand order. Defendant did not in any manner act illegally in denying TSB Holdings' site plan. To grant Plaintiffs' requested relief would violate public policy. Plaintiffs' claims should be dismissed.

RULING

IT IS THEREFORE ORDERED that the writ of certiorari is annulled. Plaintiffs' claims against Defendant are dismissed as a matter of law. Costs are assessed to Plaintiffs.

Clerk to notify.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV076128	TSB HOLDINGS LLC ET AL VS BOARD OF ADJUSTMENT CITY OF IC

So Ordered

Chad A. Kepros

Chad Kepros, District Court Judge,
Sixth Judicial District of Iowa

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